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ONTARIO LAW REPORTS.

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CASES DETERMINED IN THE COURT OF APPEAL
AND IN THE HIGH COURT OF JUSTICE
FOR ONTARIO.

1902.

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1902.

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JUDGES

OF THE

COURT OF APPEAL

DURING THE PERIOD OF THESE REPORTS.

HON. JOHN DOUGLAS ARMOUR, C.J.O.
" FEATHERSTON OSLER, J.A.
" JAMES MACLENNAN, J.A.
" CHARLES MOSS, J.A.
" JAMES FREDERICK LISTER, J.A.
" JAMES THOMPSON GARROW, J.A.

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HON. JOHN MORISON GIBSON.

JUDGES

OF THE

HIGH COURT OF JUSTICE

DURING THE PERIOD OF THESE REPORTS.

King's Qench Division:

HON. WILLIAM GLENHOLME FALCONBRIDGE, C.J.
" WILLIAM PURVIS ROCHFORT STREET, J.
" BYRON MOFFATT BRITTON, J.

Chancery Division:

HON. SIR JOHN ALEXANDER BOYD, C., K.C.M.G.
" THOMAS FERGUSON, J.
" THOMAS ROBERTSON, J.
" RICHARD MARTIN MEREDITH, J.

Common Pleas Division:

HON. SIR WILLIAM RALPH MEREDITH, C.J.
" HUGH MACMAHON, J.
" WILLIAM LOUNT, J.

MEMORANDUM.

On the 21st November, 1902, the Honourable CHARLES MOSS, a Justice of Appeal, was appointed Chief Justice of Ontario in the place of the Honourable JOHN DOUGLAS ARMOUR, appointed a Judge of the Supreme Court of Canada.

On the 21st November, 1902, JOHN JAMES MACLAREN, one of His Majesty's Counsel, was appointed a Justice of Appeal.

ERRATA.

Page 146, headnote, 6th line from the end—For "violent or negligent exposure," read "voluntary or negligent exposure."

Page 347, line 13—For "4 O.L.R. 357" read "4 O.L.R. 378."

CASES REPORTED

CASES CITED.

A.

B.

C.

G.

I.

J.

K.

L.

Q.

T.

REPORTS OF CASES

DETERMINED IN THE

COURT OF APPEAL

AND IN THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[IN THE COURT OF APPEAL.]

IN RE TOWNSHIP OF NOTTAWASAGA AND COUNTY OF SIMCOE.

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Assessment and Taxes—Equalization of Assessment—Appeal to County Court Judge—Time for Delivering Judgment—R.S.O. 1897, ch. 224, sec. 88, sub-sec. 7—Imperative Enactment.

The provision in sub-sec. 7 of sec. 88 of the Assessment Act, R.S.O. 1897, ch. 224, that the judgment of the county court Judge on appeal from the equalization by the county council of the assessment of the county shall not be deferred beyond the 1st day of August next after such appeal, is imperative.

Proceedings for equalization of the assessment, and the rolls of what financial year are to be equalized, considered.

Judgment of a Divisional Court, 3 O.L.R. 169, reversed.

THIS was an appeal by the corporation of the county of Simcoe from the order of a Divisional Court (Falconbridge, C.J.K.B., and Street, J.,) dismissing the appeal of the present appellants from the order of Boyd, C., in Chambers, dismissing the application of the appellants for an order prohibiting the Judge of the county court of Simcoe from further proceeding with or determining an appeal pending before him by the corporation of the township of Nottawasaga against the equalization of the assessment of the county, upon the ground that the township corporation had never authorized the appeal, or agreed to the same being determined by the county court Judge, and upon the ground that the time fixed by statute, namely, the 1st August, 1901, had elapsed, and the Judge had no jurisdiction.

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The opinions of the Chancellor and the Divisional Court are reported 3 O.L.R. 169.

The appeal was heard by ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 31st January and 3rd February, 1902.

C. E. Hewson and *A. E. H. Creswicke,* for the appellants. The appellants rely on the *argumentum ab inconvenienti* for the purpose of shewing that the imperative language in sub-sec. 7 of sec. 88 of the Assessment Act, R.S.O. 1897, ch. 224, must have its ordinary signification. If some date is not to be peremptorily fixed before which the appeal in question must be determined, it follows that the conclusion of it might be postponed indefinitely. Section 87 lays it down that prior to the 1st July each year the county council shall, *before imposing* any county rate, examine the assessment rolls for the preceding years of the different local municipalities, and shall, if necessary, increase or diminish the total local valuation in each, so as to produce a just relation in values between all of them. This constitutes the equalization. On this equalization the county council then passes its by-law imposing a rate for county purposes. Section 93 authorizes the passing of the by-law, and it must be on this equalization. This is quite evident from sub-sec. 10 of sec. 88, because, after having dealt in the previous sub-sections with the question of appeal by any dissatisfied municipality, this sub-section declares that, in the event of any alteration being made in the equalization, as the final outcome of an appeal, the county Judge or court before whom the appeal has been disposed of, shall direct the clerk of the county council to reduce or increase the rate *imposed by the by-law* so that such rate will produce the sum which *such by-law* is intended to provide. The by-law referred to must of course be a by-law passed imposing a rate for the current year on the rolls of the preceding year (sec. 87) as equalized in the current year, for the appeal must be against the current year's equalization: see also the Municipal Act, sec. 404. Section 91 expressly directs that the rolls of the preceding year shall be taken as the basis upon which the apportionment of the county rate is to be made. This is the only point decided in *Re Revell*

and County of Oxford (1877), 42 U.C.R. 337. Section 92 confirms this view by explaining what is to be done in the case of a new municipality having no rolls *for the next preceding year.* Section 94 makes it incumbent on the county clerk to certify to the clerks of the local municipalities before the 15th day of August in each year the amounts required of the different local municipalities for county purposes, and these clerks are then to calculate and insert the same in the collectors' rolls *for that year*; and by sec. 129 these rates are to be put down in a separate column headed "County Rates" (*Grier* v. *St. Vincent* (1867), 13 Gr. 512, *Clarke* v. *Town of Palmerston* (1883), 6 O.R. 616); and these rolls when so completed are to be delivered to the collector on or before the 1st October: sec. 131. It follows as the result of non-compliance with these statutory provisions that either the county must do without its levy for the year or the different local municipalities must postpone the collection of their rates; their different officers violating in their turn the provisions of secs. 131, 144, 157, and 267, and subjecting themselves without any fault of their own to the penalties prescribed by sec. 249. Each local municipality must levy its rate within the current year for the payment of all its debts falling due within such year: sec. 402 of the Municipal Act. The county, and the municipalities composing it, would be unable, were it otherwise, to levy funds to meet the amounts becoming due to debenture-holders and other creditors, and any protracted appeal, such as the one in question, would completely disarrange the affairs of the county and every municipality in it and throw the whole municipal machinery out of gear. In another view, if the county clerk failed to notify the clerks of the different local municipalities by the 15th August in each year of the amounts required, as provided by sec. 94, there would be nothing to prevent the different local municipalities from proceeding as provided by law to collect their rates on the assumption that a county rate, not having been demanded of them, would not be required, and an action afterwards by the county against any local municipality, under such circumstances, to recover an amount subsequently certified as required by the county, could not be maintained: Maxwell on Statutes, 2nd ed., p. 348;

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County of Lincoln v. *Town of Niagara* (1866), 25 U.C.R. 578. It was in view of these serious consequences that the Chancellor first held that the stipulation as to time contained in sub-sec. 7 must be imperative: *Town of Trenton* v. *Dyer* (1894), 21 A.R. 379, at p. 381; *Caldow* v. *Pixell* (1877), 2 C.P.D. 562; Maxwell on Statutes, 2nd ed., pp. 230 and 452; *Noseworthy* v. *Buckland-in-the-Moor* (1873), L.R. 9 C.P. 233; *Howard* v. *Bodington* (1877), 2 P.D. 203; *In re Smith and Township of Plympton* (1886), 12 O.R. 20, 35. *Re Revell and County of Oxford*, 42 U.C.R. 337, has now no application: first, because the only point decided in it was that a certain by-law was invalid for imposing a rate on an equalization that had taken place the same year on the rolls of the same year, instead of on the equalization which should have taken place the preceding year of such preceding year's rolls; and secondly, because of subsequent statutory amendments. It was decided under the Assessment Act of 1869 (32 Vict. ch. 36) in 1877. Since then 32 Vict. ch. 36 has been amended by 46 Vict. ch. 24, sec. 1, and by 52 Vict. ch. 29, sec. 6, by adding what now is sub-sec. 10 of sec. 88. Moreover, the different times for doing or completing the different steps in municipal management have since that case been altered. Under the Assessment Act of 1869 the time for completion of rolls by the court of revision was the 15th June: sec. 59. Now it is the 1st July: sub-sec. 19 of sec. 71 of R.S.O. ch. 224. Then the Judge on appeal from the court of revision had to have his judgment so that a return could be made to the local clerk before the 15th July: sub-sec. 6 of sec. 63 of Act of 1869. Now the time is the 1st August: sub-sec. 7 of sec. 75 of R.S.O. ch. 224. Then the local clerk was required to transmit without delay to the county clerk a certified copy of the revised roll: sec. 70 of Act of 1869. Now he has ninety days within which to do this: sec. 83 of ch. 224, R.S.O. These earlier enactments shew that it was contemplated to have the certified copies of the rolls in the hands of the county clerk to the end that they might be equalized that same year by the county council before the 1st July, provision being made by sec. 72 of the earlier Act that the omission to have such certified copy of a roll transmitted in time should not prevent the county council from equalizing, however, in its

absence. The changes referred to indicate that it cannot now be intended that a county council should equalize the rolls of the *current* year, for the equalization is to be done on or before the 1st July: sec. 87 of R.S.O. ch. 224: whilst the courts of revision have now up to the same day for the completion of these same rolls: sub-sec. 19 of sec. 71 of R.S.O. ch. 224; the county Judge has until the 1st August (sub-sec. 7 of sec. 75, R.S.O. ch. 224) for making his return, whilst the local clerk may delay the transmission of his copy to the clerk of the county council for three months longer: sec. 83, R.S.O. ch. 224. The Court below has, it is submitted, also overlooked the statutory amendments referred to, especially the addition of sub-sec. 10 of sec. 88 by 52 Vict. ch. 39, sec. 6. The effect of the decision of the Court below seems to be that the inconveniences and disarrangements that have been pointed out cannot happen, because, whilst the county council does not now, by reason of the amendment 46 Vict. ch. 24, sec. 1, equalize the rolls of the current year for next year's use, as pointed out in the dictum of Harrison, C.J., in *Re Revell and County of Oxford*, 42 U.C.R. 337, it now equalizes in the current year the rolls of the *preceding* year for *next* year's use. In so holding it is submitted that sub-sec. 10 of sec. 88, R.S.O. ch. 224, would be rendered nugatory, whilst, on the other hand, by holding that it is the duty of the county council to equalize in the current year the rolls of the preceding year for the *current* year's taxation, effect can be given to every part of the statute and all sections would be in harmony. The word "shall" in sub-sec. 7 of sec. 88 of R.S.O. ch. 224 should receive its ordinary force as set out in the Interpretation Act, R.S.O. 1897, ch. 1, sec. 8, sub-sec. 2, because to weaken it would make the provision in question "inconsistent with the intent and object of the Act," in which the word is used, notwithstanding that sec. 7 of the Interpretation Act declares that such word shall be construed as imperative "except in so far as the provision is inconsistent with the intent and object of such Act," etc. *Primâ facie* the word is obligatory, and it is on the respondents to establish that it is merely directory: *Town of Trenton* v. *Dyer*, 21 A.R. 379; *S.C.* (1895), 24 S.C.R. 474, 476, 477; *Ringland* v. *Lowndes* (1863-4), 9 L.T.N.S. 479, 12 W.R. 1010;

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Darnley v. *London, Chatham, and Dover R.W. Co.* (1867), L.R. 2 H.L. 43; *Ex p. Blaiberg* (1883), 23 Ch. D. 254, 258. The wording of sub-sec. 7, as regards the time limit, is in the negative form, and negative words make the provision in question imperative: *The King* v. *Justices of Leicester* (1827), 7 B. & C. 6, 13; *Thackery* v. *Township of Raleigh* (1898), 25 A.R. 226, 238; *Regina* v. *French* (1887), 13 O.R. 80; *Re Ronald and Village of Brussels* (1882), 9 P.R. 232, at p. 238. Where the Legislature constitutes a court for a special purpose, as has been done by sub-sec. 4 of sec. 88, and fixes a time limit beyond which the judgment of that court shall not be deferred, the moment the mark has been overstepped the court ceases to have any jurisdiction. The wording as regards this time limit is the same in sub-sec. 7 as in sub-sec. 4. The fact that by sub-sec. 9 of sec. 88 the costs of the proceedings on the appeal are to be taxed on the county court scale is another indication that the Legislature never contemplated that the hearing of an appeal should be protracted. If, as put in the judgment of the Court below, the interpretation to be put on the words in question makes it a choice as between two evils, then the ordinary and natural meaning and force of the word "shall" should be given to it. The appeal to the county Judge was not authorized by the respondents, inasmuch as no by-law was passed by their council authorizing the giving of the necessary and requisite notice of the appeal within the time (10 days) provided by law, nor agreeing that the appeal should be determined by the county Judge: sec. 88, sub-secs. 1, 2, 7. It was not by law or statute the duty of the respondents' clerk to give the notice provided by the statute, nor had he any authority to give the same without a by-law authorizing him as agent or attorney of the council to do so. A resolution would not be sufficient to authorize or empower a solicitor to give this notice, and, by analogy, not sufficient to authorize the clerk: *Barrie Public School Board* v. *Town of Barrie* (1899), 19 P.R. 33, and cases there cited. The clerk has no executive powers or authority to do acts for the council other than such as are conferred by by-law or specially authorized by statute. The reeve is the executive officer of the corporation: R.S.O. 1897, ch. 223, secs. 278, 279. All powers of the council are to be

exercised by by-law when not otherwise authorized or provided for: R.S.O. 1897, ch. 223, sec. 325; *Holt* v. *Township of Medonte* (1892), 22 O.R. 302. The exercise of the right to appeal is a matter connected with the municipal government of the municipality, and therefore the provisions of the Municipal Act as to the necessity of a by-law apply. If the agreement to submit the appeal to the determination of the county Judge can be deemed sufficiently signified by a resolution, this does not help the respondents, because there was no one who had or was given authority to serve or deliver the requisite notice in writing, and the notice given was a nullity. The subsequent passing of a by-law on the 12th August, more than a month after the time for giving the notice had expired, authorizing the reeve to employ a solicitor to conduct the appeal, cannot cure the defect, because, unless notice was given as provided by the statute within the time allowed, then no appeal was pending.

Haughton Lennox, for the respondents. The Court is not driven to "a choice of evils." If the council complies with secs. 87 (as to equalization) and 91 (as to levy) of R.S.O. ch. 224, no inconvenience results from construing sub-sec. 7 as directory, or as imperative only in the sense of imposing a duty. "The apportioning of a county rate" (under sec. 91) and the "equalization of assessments" (under sec. 87) are entirely distinct acts. Equalization *must be* before 1st July—the apportionment need not be. The council know, or are presumed to know, the total sum required for county purposes, and, in exercising the powers conferred by sec. 91, have a specific and limited legislative authority, but no discretionary power. The council must take the rolls "finally revised and equalized for the preceding year"—that is, *finally* equalized as well as revised—"as the basis upon which the apportionment is to be made." They are dealing with fixed quantities—they cannot alter the rolls—they have no discretion: *Re Revell and County of Oxford*, 42 U.C.R. 337, at p. 344. The rolls can only become finally equalized when the Judge has passed upon them, or the time for appeal against the equalization by the council has expired. But, in order that there shall be a finally revised and equalized roll in readiness for each year's county

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levy, sec. 87 provides that the rolls of the last preceding financial year shall be advanced a stage. They shall be compared with what has become by a previous examination, and equalization by the council, and appeal to the county Judge, or by the lapse of the time for appeal, collectively, a county roll as the basis of levy. In doing this the council may increase or decrease the several rolls, "as made by the assessors," so that the valuations of the several municipalities shall bear a just relation to one another; taking as a basis for these relative valuations the valuations which have become established, by final revisions and equalizations, and have so become *the* basis of levy: *Re Revell and County of Oxford*, at pp. 344-6. Under this section the council exercise judicial functions, they have large discretionary powers, and "their opinion" governs; subject to this, only, that their opinion may be modified upon appeal. The distinction between the rolls dealt with under the two sections is very marked. In sec. 87 it is "the rolls made by the assessors in the several townships," etc. Under sec. 91 it is these "as finally revised and equalized for the preceding year," that are dealt with. The method of equalization and apportionment, or levy, are both involved in the decision in *Re Revell and County of Oxford.* Section 74 of the Act of 1869 was there declared to require that the rolls must be equalized a year previously to becoming the basis of apportionment. The Legislature, with knowledge of this declaration of construction, by re-enacting this section, as they did, without alteration—now sec. 91—must be taken to have adopted the judgment of the Court: *Whelan* v. *The Queen* (1868), 28 U.C.R. 2, at p. 43, referring to *Mansell* v. *The Queen* (1857), 8 E. & B. 54, 73; *Crain* v. *Trustees of Collegiate Institute, Ottawa* (1878), 43 U.C.R. 498. The omission of the words "for the current year" from sec. 87 of the present Act, does not affect the principle of county levy as established by *Re Revell and County of Oxford.* The same incipient equalization is to take place, but owing, perhaps, to the difficulty experienced of having the rolls for the current year available in June, and because of the vagueness referred to by Mr. Justice Wilson at p. 340, the Legislature eliminated the words "for the current year." Therefore delay in completing the appeal on equaliza-

tion does not derange the provisions of the Assessment Act, or cause inconvenience, and the construction placed on secs. 87 and 91 by the Divisional Court is the proper construction. In any case the language employed in sec. 88 should not be held to be imperative. There are no nullifying words—no imperative prohibition against proceeding later: *The Queen* v. *The Mayor of Rochester* (1857), 7 E. & B. 910, 923; *In re Ronald and Village of Brussels*, 9 P.R. 232, 237-8; *Cole* v. *Green* (1843), 6 M. & G. 872, 890; *Doidge* v. *Mimms* (1899), 12 Man. L.R. 618; *Pearse* v. *Morrice* (1834), 2 A. & E. 84, 96; *Regina* v. *Heffernan* (1887), 13 O.R. 616. Similar language in our Acts has usually been held to be merely directory: *Nickle* v. *Douglas* (1874), 35 U.C.R. 126; *Re McFarlane* v. *Miller* (1895), 26 O.R. 516; *Town of Trenton* v. *Dyer*, 21 A.R. 379; *In re Ronald and Village of Brussels*, 9 P.R. 232; *Re Farlinger and Village of Morrisburg* (1889), 16 O.R. 722; *In re Smith and Township of Plympton*, 12 O.R. 20; *Regina* v. *Heffernan*, 13 O.R. 616, at p. 626; *Lewis* v. *Brady* (1889), 17 O.R. 377; *Ex p. Danaher* (1888), 27 N.B. Reps. 554, at pp. 564, 570; *Danaher* v. *Peters* (1889), 17 S.C.R. 44; Hardcastle on Statutes, 3rd ed., p. 72; *Township of Whitby* v. *Harrison* (1859), 18 U.C.R. 603; *Municipality of Whitby* v. *Flint* (1860), 9 C.P. 449; *Maisonneuve* v. *Township of Roxborough* (1899), 30 O.R. 127. If the language used is imperative, it is imperative only in the sense of imposing a duty, but not imperative or *final* in the sense of a condition upon which the respondents' rights are to hinge: *Nickle* v. *Douglas*, 35 U.C.R. at p. 140; *Regina* v. *Buchanan* (1898), 12 Man. L.R. 190. The Dominion and Provincial Interpretation Acts as to "shall" and "may" are identical; and in penal statutes questions of doubt are to be construed favourably to the accused: *North Ontario Election Case* (1875), H.E.C. 304. The appeal from the equalization does not stay the proceedings of the council in any sense; they have issued their precept to the municipalities, and, if the rate has been validly imposed, they can enforce payment. No inconvenience would therefore result. There has been no avoidable delay. It was impossible to complete the equalization by the 1st August; and if the Legislature had intended, in conferring the right of appeal, to divest it in such a case, the

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intention would and must have been clearly expressed. Delay, however great, in the progress of a suit cannot deprive the plaintiff of rights which existed at the time of its commencement: *Foster* v. *McMahon* (1847), 11 Ir. Eq. R. 287: and the failure or default of the Judge could not deprive the respondents of their rights. The Judge is to equalize the whole county, and Nottawasaga is only one of the interested parties. Greater inconvenience and hardships would result from holding the language imperative than from holding it to be directory. There is no provision in the Act to substitute any person for the Judge of the county, and no provision for the case of illness, absence, or accident. The evidence was not completed on 1st August, and the Judge could not, under these circumstances, be said to have "deferred" the giving of judgment. The Judge of the county court is acting as *persona designata*, and prohibition does not lie: *In re Godson and City of Toronto* (1889), 16 A.R. 452, (1890), 18 S.C.R. 36. The appellants, having decided to proceed beyond the 1st August and take chances of success, should not now have prohibition—they have created the inconvenience. If a by-law was necessary, the appellants, by forwarding the notice of appeal to the Judge, with knowledge of the facts, submitted to the jurisdiction, and have waived all objections: *Nickle* v. *Douglas*, 35 U.C.R. at p. 141; *Re Smart and O'Reilly* (1878), 7 P.R. 364; *In re Jones* v. *James* (1850), 19 L.J.N.S.Q.B. 257; *Moore* v. *Gamgee* (1890), 25 Q.B.D. 244. The proceedings are under the Assessment Act, and a by-law is not required: *Township of Pembroke* v. *Canada Central R.W. Co.* (1882), 3 O.R. 503, 508; *Port Arthur High School Board* v. *Town of Fort William* (1898), 25 A.R. 522. In any case the proceedings were authorized by by-law (on 12th August), before prohibition applied for. This is sufficient: *Dawson* v. *Town of Sault Ste. Marie* (1889), 18 O.R. 556.

Hewson, in reply, as to the right to prohibition, referred to *In re Brazill* v. *Johns* (1893), 24 O.R. 209; *Robertson* v. *Cornwell* (1878), 7 P.R. 297; *Mayor of London* v. *Cox* (1866), L.R. 2 H.L. 239.

April 12. ARMOUR, C.J.O.:—The statement of the case in the judgment appealed from renders unnecessary any further statement, the only question being whether the provision in sub-sec. 7 of sec. 88 of the Assessment Act that "the judgment shall not be deferred beyond the 1st day of August next after such appeal" is imperative or merely directory.

By sec. 7 of the Interpretation Act it is provided that "this section and sections 8 to 12 of this Act and each provision thereof, shall extend and apply to these Revised Statutes of Ontario and to every Act of the Legislature of Ontario, passed after the said Revised Statutes take effect, except in so far as the provision is inconsistent with the intent and object of such Act, or the interpretation which such provision would give to any word, expression or clause, is inconsistent with the context, and except in so far as any provision thereof is in any such Act declared not applicable thereto." And by sec. 8 it is provided that "subject to the limitations in the preceding section of this Act—in every Act to which this section applies . . . 2. The word 'shall' shall be construed as imperative and the word 'may' as permissive."

The word "shall," therefore, in the provision that "the judgment shall not be deferred beyond the 1st day of August next after such appeal" must be construed as imperative unless such construction is inconsistent with the intent and object of the Assessment Act, or is inconsistent with the context, or is declared by that Act not to be applicable thereto; and none of these exceptions exists in respect of this provision.

There is nothing in the Assessment Act declaring that this interpretation of the word "shall" shall not be applicable to it, nor is this interpretation inconsistent with the context, nor is it inconsistent with the intent and object of the Act.

On the contrary, the intent and object of the Act plainly require that this provision should be construed as imperative, and this is apparent from the provisions of sub-sec. 10 of sec. 88 and of secs. 93, 94, 129, and 131, of the Assessment Act.

In my opinion, the appeal should be allowed with costs here and below.

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Osler, J.A.:—Equalization of the assessment rolls is a proceeding which takes place solely in connection with, and as a preliminary to, the work of the county council in passing their by-law and striking the rate for moneys to be levied for county purposes: Assessment Act, sec. 87.

The county does not directly levy and collect these moneys through its own officials, but does so through the medium of the officials of the several local municipalities. Nor is the rate struck by the county, and specified in its by-law, that by which the amount payable by the individual ratepayer is ascertained. The county council takes the aggregate of the valuations on the assessment rolls of the several local municipalities as equalized, ascertains what rate as applied to this aggregate will raise the sum required to meet the county estimates (Mun. Act, secs. 403, 404), and then, taking the valuation of each local municipality as thus equalized, ascertains what in each instance the rate so struck will produce. The sum thus ascertained is the proportion of the whole amount required by the county which is to be raised and collected by the particular local municipality. This amount being certified by the county clerk to the clerk of the local municipality, the necessary rate to produce the sum payable by each ratepayer in respect of it is calculated by him with reference to the assessment roll as finally revised and corrected for the current year, and inserted in the collector's roll in the column headed "County Rates" (Assessment Act, secs. 94, 129).

The object aimed at by the equalization of the assessment rolls is to correct, as nearly as may be, eccentricities and unreasonable differences in assessments as taken in the various local municipalities, so that the incidence of the county rates may be fairly distributed over the whole of the assessable property in the county. The assessors of one township, *e.g.*, may value the same kind of property much higher or much lower than it is valued by those of another, or an adjoining township, village, or town property may be valued too high or too low; and, unless some method is provided for producing a just relation between the valuations of real and personal estate in the county, some municipalities may escape payment of their just share of the county rates according to the real value of the

assessable property therein. The aggregate of the valuation of the various local municipalities appearing upon their assessment rolls as finally revised and corrected is not to be disturbed; what is taken or deducted from the valuation of one is to be placed upon and distributed over the valuations of another or the others, and thus the whole assessment of the county is equalized. The proportion which each municipality is to contribute towards the county rate is, therefore, ascertained by the county by-law to be passed when, and not until, the rolls have been equalized by the council: secs. 87-94. For this purpose, as it would appear from sec. 88 (10), the council need not await the result of an appeal.

Then what rolls are to be equalized for the purpose of ascertaining this proportion? The rolls for the current financial year cannot be utilized, because they may not be finally completed until the 1st August, and the township clerk has 90 days thereafter in which to send copies of them to the county clerk. Therefore, as sec. 87 provides, it is the revised rolls for the preceding financial year which are to be examined and equalized, and it is the amount of the property assessed and valued on these rolls as equalized which forms the basis on which the apportionment of the county's requirements among the various local municipalities is made: sec. 91.

The council does not take, nor is there any reason why it should take, the assessment rolls which were equalized in a former year, and which must of course have been the rolls of a still earlier year. I see no reason to doubt that the meaning of the Act is that the revised rolls of the last year are to be equalized for the purpose of the county taxation of this. It must be said that the language of many of the provisions dealing with the subject, notably that of sec. 91, is very loose, and may well have caused the confusion which seems to have existed as to which equalized roll the county is to act upon.

Sub-section 10 of sec. 88 is another clause which seems to be very inaccurately expressed. It has no particular bearing upon the points now in dispute, though much insisted upon by the appellants. The Judge, on appeal, has nothing to do, that I can see, with the county rate or the county estimates. He is concerned only with equalization of the rolls, and the conse-

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quent proportions of the whole sum required by the county which are to be contributed by the several local municipalities, and it is these proportions, as they may have been ascertained by the work of the county council, which he changes if he gives effect to the appeal.

The remaining question is whether the action of the Judge upon the appeal from the equalization made by the county council, can be deferred beyond the 1st August?

Section 88, sub-sec. 7, enacts that "the county Judge shall appoint a day for hearing the appeal, not later than ten days from the receipt of such notice of the appeal" (which, by sub-sec. 1, must have been given at any time within ten days from the decision of the county council), "and may on such day proceed to hear and determine the matter of the appeal, and may adjourn the hearing from time to time, *but*, except as provided in sections 58 and 61, the judgment *shall not* be deferred beyond the 1st day of August *next after such appeal.*"

A somewhat similar provision is made in sub-sec. 4 with regard to the other tribunal by whom the appeal is to be heard, if the parties have not agreed that it shall be heard by the county Judge, except that it is expressly provided that the alternative tribunal shall "hear and determine the matter of appeal either with or without the evidence of witnesses, or with such evidence as they may decide upon hearing, and may examine witnesses under oath or otherwise, and may adjourn . . . *and*, except as provided in sections 58 and 61, the judgment of the said Court *shall not* be deferred beyond the 1st day of August *next after the notice of* the appeal."

It is useless to comment upon the manner in which these clauses have been framed. It is quite arguable that the county Judge has no power to take evidence on the appeal to him, a power which is expressly conferred upon the other tribunal; and in clause 4 the date beyond which judgment is not to be deferred is more carefully defined by a reference to the notice of the appeal than it is in clause 7, which speaks only of "such appeal." I think, however, that in the latter the notice of the appeal must be taken to be intended as in sub-section 4: *In re Shaw and City of St. Thomas* (1899), 18 P.R. 454 (C.A.).

The appellants rely upon sec. 8, sub-sec. 2, of the Interpretation Act, which enacts that, "the word 'shall' shall be construed as imperative and the word 'may' as permissive."

This provision is, however, subject to the qualification of sec. 7 (1)—"except in so far as the provision is inconsistent with the intent and object of such Act, or the interpretation which such provision would give to any word, expression or clause, is inconsistent with the context."

The statutory canon is, therefore, as Moss, C.J.O., pointed out in *Re Lincoln Election* (1878), 2 A.R. 324, at p. 341, exceedingly elastic, and no new rule of construction is introduced by it. It is merely declaratory of the rule already established by judicial decision. See also *Hands* v. *Law Society of Upper Canada* (1890), 17 A.R. 41, 50, 62. There seems no substantial difference between the above clauses of the Interpretation Acts, R.S.O. 1887, ch. 1 and R.S.O. 1897, ch. 1, and those of the original Act, 31 Vict. ch. 1, sec. 6 (2) (O.), construed in *Re Lincoln Election, supra.*

It rests upon the respondents to shew that the word "shall" is to be read in sec. 88, sub-secs. 4 and 7, in the permissive sense; and, in my opinion, they have failed to do so. The only substantial argument, and I concede its force, in favour of the construction they contend for, is, that the Legislature has given an appeal which may become abortive if, by reason of delay of the parties, or of the time occupied in hearing it, or the delay of the Judge in giving judgment after argument, it is not disposed of by the 1st August. Therefore, it is said that, although the appeal ought to be disposed of by that time, the Legislature cannot have intended that it shall be rendered abortive by a necessary delay, or that judgment shall not be effectual even if it should be given afterwards.

Opposed, however, to this view are the considerations that the words of the sub-section are in the emphatic negative form, "*but* the judgment *shall not* be deferred beyond the 1st day of August," and not only so, there is an excepted case, "except as provided in sections 58 and 61," in which it seems to be implied that judgment may be so deferred. The force of this exceptive language, as aiding the construction of what follows it, as imperative and prohibitory, is weakened by the fact that it may not be

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very easy to apply the exception. Then, as to the argument from inconvenience: the rolls have been in fact equalized by the county council. It is not as if the action of the council was neutralized by the mere fact of taking the appeal. If the appeal drops, the council proceeds upon its own decision, which operates only upon the taxation of the present year. The inconvenience in that respect is not great, nor is the sum ultimately involved large. On the other hand, were it to be held that judgment might be delayed, we know not where we shall stop, and the whole system of the annual municipal procedure for assessment and realization of revenue, culminating in the delivering of the collectors' rolls on the 1st October, instead of observing the

"... degree, priority, and place, ... course, proportion, season, form, ... in all line of order,"

which the Municipal and Assessment Acts attempt to provide for, may be thrown into confusion. There is no such serious inconvenience involved in the loss of the appeal for a single year as to warrant us in giving the language of sub-sec. 7 less than its full force, and treating it as otherwise than an absolute prohibition against continuing the appeal after the date specified as the last day for giving judgment thereon. I rather infer that this was the view of a former learned Judge of the county of Simcoe (the present Senator Gowan), on the *Simcoe Equalization Appeal*, before him in 1869, as reported in 5 U.C.L.J.N.S. 295; and may add that I very much doubt whether the Legislature ever intended that evidence should be admitted on such appeals, in such minuteness of detail as to lot values, etc., as appears to have been done in the present case.

I would, therefore, allow the appeal.

MACLENNAN, J.A.:—I am of opinion that this appeal should be allowed.

The learned Chancellor thought the case was governed by the decision in *Re Revell and County of Oxford*, 42 U.C.R. 337, 345, in which the question was whether the county rate was to be struck upon the basis of the rolls for the current year after the same had been equalized, or upon the revised and equalized rolls for the preceding year, and in which it was

held that the latter was the proper course of proceeding. Holding that authority to be applicable, he dismissed the motion. The Divisional Court was of opinion that the *Revell* case was inapplicable, but, nevertheless, affirmed the judgment.

As I understand the judgment, the Court was of opinion, that, notwithstanding the injunction of the Legislature in sec. 88 (7) that judgment on the equalization appeal shall not be deferred beyond the 1st day of August next after the appeal, the hearing might be deliberately proceeded with, and that judgment might be deferred, for an indefinite period beyond that date.

If it were so that the roll, if and when equalized, was not to be used for striking the county rates until the following year, it might perhaps be allowable to construe the limit of time to be directory, although that would be a strong thing to do, having regard to the language used. But sections 91 and 93 leave no doubt that the county rate must be struck, in each year, upon the revised and equalized rolls for the preceding year. And such is distinctly stated to be the effect of these sections in the judgment. That is expressed as follows: "As the sections 87 and 91 now stand, their meaning is plain. The county council in the year 1900, for example, takes the assessment rolls for the year 1899, and equalizes them (sec. 91), and then in apportioning the county rate it takes these rolls of the preceding year 1899, which have been equalized for that year, and strikes the county rate for 1900 upon them (sec. 91)."

The effect of the judgment is, that all the proceedings subsequent to the 1st day of August prescribed by the Act for the collection of the taxes of the current year must be more or less delayed and deranged by delay in the equalization. The scheme of the Act for the recovery of taxes is that the assessment rolls for the current year are to be finally revised and complete by the 1st of August, and it is the duty of the clerk of each municipality then to commence the preparation of the collector's roll, so that he may place it in the hands of the collector on or before the 1st of October. This roll is required to contain the county rate, and to that end, by sec. 94, the county clerk *shall*, before the 15th day of August, certify it to the clerk of each municipality. By sec. 402 of the Municipal

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Act it is made the duty of the council of every municipality to assess and levy on the ratable property within its jurisdiction, a sufficient sum to pay all the debts of the corporation, whether principal or interest, falling due within the year, and by sec. 409 of the same Act the taxes and rates for any year are considered to have been imposed and to be due on and from the 1st day of January, and ending with the 31st day of December. The proceedings for this assessment and levy consist of a number of successive steps, and the Legislature has assigned what it has deemed a reasonably sufficient length of time for each of these steps, so that the taxes may, as far as possible, be levied and in hand before or soon after the end of the year (sec. 144). If the time for taking any one step is exceeded, the time allowed for the next step is to that extent shortened, or conceivably taken away altogether, contrary to the evident intention of the Legislature.

In the present case, the respondent township passed its resolution to appeal on the 25th of June, and it had from that day to the 1st of August to prosecute it to completion. The statute required in the most emphatic terms that judgment should not be deferred beyond the 1st of August, and yet the proceeding went on until the 17th of September, and was not completed even then. Instead of having the county rate for insertion in their collectors' rolls on the 15th of August, as they were entitled to by sec. 94, so as to get the collectors' rolls ready for delivery on the 1st of October (sec. 131), three-fourths of the time allowed by law for the preparation of the rolls had been consumed by the previous proceeding. It is evident that very great inconvenience and confusion must result, and that the scheme provided by the Legislature for the recovery of the taxes within the year, must be, to a great extent, a failure, unless the equalization appeal is kept within the prescribed limits.

But it is said that injustice may result from applying the restriction; that the Legislature could not have intended an appeal to become abortive for want of sufficient time to complete it. To this it may be answered that the very nature of the proceedings required that the time for completing the appeal should be limited, being one of a series depending upon

and following each other, and the whole requiring to be completed within a limited time; that the Judge and the parties were bound to act and could have acted reasonably, so as to comply with the enactment; and that the Legislature, which might have made the decision of the county council final, had given the right of appeal upon the express condition that judgment should not be deferred beyond the 1st day of August. These answers might well be considered sufficient to require the time limit to be held obligatory; but, if the inconvenience of not being able to complete an appeal in time be admitted, and be as great as it was represented to us to be, as much inconvenience, and indeed, I think, much more, must result from an appeal being prolonged, as in this case, until the middle of September, without being finished even then. There being inconvenience, whatever construction we put upon this language, I think it is impossible to disregard the prohibitory language of the Legislature. The Judge is *forbidden* to defer his judgment. It is not merely *shall* do something, as that he shall give his judgment on or before the 1st of August, but he *shall not* defer it beyond that date. He is bound so to regulate the proceedings before him that he may comply with the statute. He had the power to do that. He could assign to the parties, and reserve for himself, what he deemed a reasonable share of the time at his disposal. I am unable to see that to hold the word "shall" to be obligatory is either inconsistent with the context, or inconsistent with the intent or object of the Act, and therefore, as required by the Interpretation Act, it must be held imperative.

MOSS, J.A.:—I agree.

LISTER, J.A., died while the appeal was standing for judgment.

E. B. B.

[DIVISIONAL COURT.]

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April 23.

BASTON v. TORONTO FRUIT VINEGAR COMPANY.

Contract—Acceptance—Sale of Goods—Contract by Delivery.

The plaintiff, who had had previous dealings with the defendants, wrote to them on May 5th asking them if they were going to buy cucumbers that year, and what they were going to pay for them ; adding, "please let me know as I want to make a contract with someone for them, as I want to put in quite a few this year." The defendants replied, "We are pleased to learn that you are going to do a lot of growing this year, and will be pleased to take all you grow at same price as last year. We will see you later on and make final arrangements." Nothing further occurred until the following August, when the plaintiff sent several loads of cucumbers to the defendants, who accepted them and paid for them, nothing being said at the time of any contract between the parties :—

Held, that the defendants' letter was not an offer open to acceptance by the plaintiff, or by the delivery of cucumbers to them by the plaintiff, but a statement of their readiness to enter into an agreement with the plaintiff upon terms to be arranged.

Carlill v. *Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256, distinguished.

Judgment of Falconbridge C.J.,K.B., affirmed.

AN appeal by the plaintiff from the judgment at the trial was argued before a Divisional Court [MEREDITH, C.J.,C.P., and FERGUSON, J.] on the 27th of February, 1902. The facts and the line of argument and cases relied on are stated in the judgment.

S. B. Woods, for the plaintiff.

The defendants were not represented.

April 23. The judgment of the Court was delivered by MEREDITH, C.J.,C.P. :—This is an appeal by the plaintiff from the judgment of the Chief Justice of the King's Bench, pronounced on the 8th of April, 1901, dismissing the action, after the trial of it before him at Toronto on the 3rd of the same month.

The action is brought to recover damages for the respondents' refusal to carry out an alleged contract between the appellant and them for the purchase by them from her of the whole of her crop of cucumbers grown in the year 1900, and the question in dispute is as to the existence of the alleged contract.

The respondents had purchased the appellant's crop in 1899, and their agreement for that year is in writing. It contains stipulations as to the quantity of ground to be planted, the times for the delivery of the cucumbers, and the prices to be paid, and provisions as to the quality of the cucumbers, and the terms of payment for them, which were that for those delivered before the 1st of September, payment was to be made on the 2nd of September; for those delivered from the 2nd of September to the 6th of October, on the 7th of October; and for the remainder of the crop on the first Saturday following the last delivery.

On the 5th of May, 1900, the appellant wrote a letter to the respondents' manager in the following terms:—

"Goodwood, Ont., May 5th, 1900.

Mr. McCormick.

Dear Sir:

Are you going to buy cucumbers this year at Stouffville, and what are you going to pay for them. Please let me know, as I want to make a contract with some one for them, as I want to put in quite a few this year. As you have always dealt fair with me, I would like to sell you some more this year. Please let me know by return of mail.

Yours,

Mrs. E. Barton,
Goodwood."

This was replied to by the following post card:

"Toronto, May 6th, 1900.

Dear Madam:

Yours of 5th inst. to hand, and in reply may say we are pleased to learn you are going to do a lot of growing this year, and will be pleased to take all you grow at same price as last year. We will see you later on and make final arrangements.

Hoping this will be satisfactory,

We are yours,
The Toronto Fruit Vinegar Co., Limited,
Per W. J. McCormack, Secy.-Treas."

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Nothing further occurred between the parties until the following August. The appellant had meantime planted six acres with cucumbers, and in August, when the first of them ripened, she sent several loads to Stouffville for delivery to the respondents there, and they were delivered to and paid for by the respondents, but it is clear upon the evidence that they were not received by them as under the alleged contract or any contract with the appellant, but were received and paid for as cucumbers offered for sale to the respondents' agent at Stouffville, and purchased by him on the respondents' account.

The learned Chief Justice was of opinion that the appellant's letter of the 5th of May was not an offer to sell to the respondents but only an inquiry of their manager whether he intended to buy cucumbers in that year, and that the post card of the 6th of May was not an acceptance of an offer, that it called for an answer and none was given, and that the concluding words would probably prevent the post card "under any circumstances . . . being construed as an acceptance constituting a binding contract," and he dismissed the action.

Upon the argument before us, Mr. Woods put the appellant's case upon a ground which was apparently not taken before the learned Chief Justice, viz., that the post card of the 6th of May amounted to a proposal by the respondents to purchase the crop which, according to her letter, she intended to grow that year, on the terms mentioned in the post card, and that the delivery of the cucumbers in August amounted to an acceptance of that proposal, which then remained open for acceptance by her, and he cited numerous cases which, as he argued, established the correctness of that contention.

The case mainly relied on—*Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256—is, I think, plainly not applicable. Lord Justice Bowen, at p. 269, after stating that as an ordinary rule of law an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together, and pointing out that there is a clear gloss to be made on that doctrine, proceeds to say: "That as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do

so, and I suppose there can be no doubt that where a person in an offer made by him to another person expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance; and if the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification." The Lord Justice then gives illustrations as to the application of the principle he has enunciated, which are to be found at page 270, and it is unnecessary to quote them.

It is manifest, I think, that in this case, so far from there having been any intimation, express or implied, by the respondents that they did not require any notification by the appellant of her acceptance of the offer, or that delivery of the cucumbers when they were grown and ready for delivery would be a sufficient acceptance, the opposite is the case; and it is besides plain, I think, that the respondents' post card was not an offer open to acceptance by a mere affirmative answer from the appellant, but a statement of the respondents' readiness to enter into an agreement with the appellant if she was willing to accept the same price that had been paid to her in the previous year, and after the parties had met an agreement should be come to.

In *Brogden* v. *Metropolitan R W. Co.* (1877), 2 App. Cas. 666, 691, cited by Mr. Woods, Lord Blackburn, as Lord Justice Bowen says at page 270 of the *Smoke Ball* case, appears to take exactly the line which the Lord Justice indicated in the latter case.

In *Clarke* v. *Gardiner* (1861), 12 Ir. C.L. 472, goods were shipped by the seller immediately after receiving the offer to buy, and all that was held by the majority of the Court was that the shipping of the goods in these circumstances amounted to such an acceptance as made the contract complete and binding on the buyer; apparently for the reason that as a letter of acceptance posted on the same day that an offer is received makes the contract complete from the moment the letter is

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posted, the same effect should be given to the immediate shipment of the goods as to the writing of a letter of acceptance; and it is to be noted that Mr. Justice Christian entertained grave doubts as to the correctness of the conclusion to which the majority of the Court came.

That case, however, assuming it to have been rightly decided, does not help the appellant, as the principle of the decision is wholly inapplicable to this case.

My conclusion as to the meaning of the words "final arrangements" in the post card of the respondents is that they mean the concluding of a contract, and do not refer to minor arrangements for carrying out a concluded contract, as those words were taken to mean in the correspondence which was in question in *Richards* v. *Hayward* (1841), 2 M. & G. 574.

For these reasons, I am of opinion that the ruling of the learned Chief Justice was right, and that his judgment should be affirmed, and the appeal from it be dismissed with costs.

R. S. C.

[BRITTON, J.]

REX EX REL. TOLMIE V. CAMPBELL.

1902
April 14.

Municipal Corporations—Election of Reeve—Quo Warranto—Illegal Voting.

At a municipal election for reeve, at which, upon a large vote, the successful candidate obtained a majority of six, it was shewn that a widespread belief prevailed among the electors of the right to vote at each sub-division in which the name of the elector appeared ; that four electors had in fact voted twice ; and that several others had received ballot papers within a polling booth, after having already voted for reeve :—

Held, that the statutory presumption arising under the Municipal Act, R.S.O. 1897, ch. 223, sec. 162, sub-sec. 3, did not apply in proceedings to set aside an election, and that as, owing to the destruction by the clerk of the ballot papers pursuant to the provisions of the Act, it was impossible to tell whether more than four voters had voted twice, the election could not be set aside, the voting twice by four electors not having, in the opinion of the Court, affected the result.

Held, also, that if, as alleged, the respondent had himself voted twice, this was not a cause for setting aside the election ; voting twice not being in itself a corrupt practice, and the commission of that offence not being, under the statute, a disqualification for office during the current year.

Held, also, that there being strong reasons to believe that the relator had himself voted more than once, and there being undoubted evidence that he had advised other electors to vote more than once, he could not successfully urge this objection against the validity of the election.

MOTION to set aside the election of Daniel Campbell as reeve of the township of Aldborough for the year 1902, argued before BRITTON, J., in Weekly Court, on the 4th of April, 1902.

The facts are stated in the judgment.

G. St. Clair Leitch, for the relator.

E. E. A. DuVernet, for the respondent.

April 14. BRITTON, J. :—The relator and the respondent were the only candidates for reeve of said township at last election.

It is stated in the notice of motion that each of thirty or more electors received a ballot paper and voted for reeve at more than one polling-place in said township at said election. Particulars of the names of these are given, with the places where at least some of them got the different ballot papers.

It is also stated that the respondent himself got a second ballot paper, and presumably voted twice for reeve—once at polling sub-division No. 8, and once at polling sub-division No. 9.

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It is also objected that the deputy returning officer at polling sub-division No. 2 left the polling-place during the hours fixed for polling. This objection was not pressed on the argument.

There was a large vote polled, viz., 1,324—665 for the respondent, and 659 for the relator—resulting in a majority of 6 for the respondent.

The whole question as to the validity of election of reeve is narrowed to that of electors voting more than once for reeve at the last election.

1st. As to electors other than the respondent himself. Apparently there was in that township a somewhat wide-spread impression that electors whose names were on the list for more than one polling-place, could vote for reeve at each such polling-place. As a matter of actual proof, no more than four are shewn to have voted more than once for reeve, but a larger number received ballot papers, and counsel for the relator asks me to presume, as against the respondent, that every elector who received a second ballot paper, after having voted, actually deposited it for reeve.

I can not do this. Section 162 of the Municipal Act prescribes a penalty for voting twice, and sub-section 3 of that section makes the act of receiving a ballot paper within the polling booth *primâ facie* evidence of the elector having there and then voted. That is applicable in a proceeding for the penalty, and it is only *primâ facie* evidence against *the elector*. It is not evidence in a proceeding of this kind. Responsibility can not be fastened upon the respondent for it unless done by his procurement or with his consent. Double voting, as complained of, is not made a corrupt practice, so that its commission, even by an agent of the respondent, would not *ipso facto* void the election. As the case stands, I can not say that the respondent has not a majority of the legal votes. I can not carry the case of double voting, as the law is, further than to say that every person who did vote more than once is liable to the penalty, and upon scrutiny his second vote would be struck off. Under the English Corrupt Practices Act, 1883, it was sought to invalidate an election and the vote by attempting to make the voting twice "personation." It was held in the *Stepney Case* (1886), 4 O'M. & H. 44, by Mr. Justice Denman, that

"The first vote was not void, and that the voter was not guilty of any offence unless the second vote was given corruptly. If the second vote was given innocently, under the honest belief that he was voting with a right, he could not be guilty of personation."

In this case, under section 162, the voter would be liable for the penalty, but in other respects the argument applies. No doubt some of those who voted twice did so believing they had the right to do so. The frequent amendments to the Municipal Act may have caused confusion in the minds of people as to what they may or may not do.

Nothing would be gained by a scrutiny. In fact, a scrutiny could not be had, as the township clerk on the 8th of February last, in presence of two witnesses, pursuant to section 188 of the Municipal Act, destroyed the poll books, ballot papers, and all the contents of the ballot boxes as returned to him by the deputy returning officers. It is not suggested at all that this was done at the instance of either the relator or the respondent. It was done as a matter of duty on the part of the clerk. It was probably mere oversight on the part of the relator that he did not apply for an order preventing the destruction of these papers, and for the retention of them pending the investigation which he proposed to have. The result is that it is now impossible to say that the respondent has not a clear majority of the legal votes of the township.

I accept as the general principle to govern courts that an election should be set aside if a Judge, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors may have been prevented from electing the candidate of their choice: *Woodward* v. *Sarsons* (1875), L.R. 10 C.P. 733, at p. 744.

There is not, in my opinion, in this case reasonable ground for believing that the result would be different if all illegal votes could be struck off.

2nd. As to the alleged double voting of the respondent. I can not, upon the evidence, find that he did so, strong as my suspicions may be that he did.

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If he did, what is the result under section 162 of the statute? 1st. He is liable to a penalty of $50, to be recovered, if sued for, in the division court. 2nd. If judgment is recovered there, he is ineligible as a candidate or elector at the next annual election. Singularly enough, it might be possible for a candidate to commit this offence, be elected, and hold office for the current year, and yet be ineligible at the next annual election. That is an anomaly. There is evidence that the respondent knew that an elector could not legally vote more than once for reeve.

3rd. Although I have dealt at some length with the relator's objections, I am of opinion that the relator is himself disqualified from attacking the respondent on the ground of double voting by electors as set forth in this application.

The relator himself encouraged certain voters, whose names were on for more than one polling-place, to vote at more than one, or if not necessary to go so far, he knew of the opinion that to so large an extent prevailed as to the right to more than one vote, and he did not object to it. He rather acquiesced in it, and only realized how illegal it was when the majority was against him. [The learned Judge discussed the evidence upon this point, and continued:]

Upon the evidence it is right to assume that the relator kept his objection back, and only put it forward when the, to him, unexpected defeat was the result: see *The Queen* v. *Lofthouse* (1866), L.R. 1 Q.B. 438, 441.

The motion should be dismissed.

As the respondent has not denied that he voted twice, and as there was to some extent, and possibly on both sides, double voting, and as the facts are somewhat unusual, I think it proper to refuse costs to the respondent.

R. S. C.

[IN THE COURT OF APPEAL.]

FORD v. THE METROPOLITAN R.W. CO.

C. A.
1902
April 10.

Negligence — Electric Railway — Dark Night — Neglect to Give Notice by Bell — Excessive Damages.

The plaintiff, travelling by electric railway along a country road on a dark night, got off at a regular stopping place. He then turned back along the road, and after he had walked some distance along it, and was moving towards the railway track, the car by which he had travelled, backing up, struck him. There was a light at both ends of the car, which was travelling at the rate of three or four miles an hour, but the current was very weak and the light slight, and the motorman came within four or five feet of the plaintiff before seeing him, and he did not sound the gong or give any other warning of his approach :—

Held that there was evidence of negligence on the part of the defendants, and the appeal from the trial judgment was dismissed and a new trial refused, on the plaintiff consenting to reduce his damages.

THIS was an appeal by the defendants from the judgment in an action for negligence brought under the circumstances mentioned in the judgment of the Court, which was delivered by OSLER, J.A.

The appeal was argued on November 15th and 18th, 1901, before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A.

A. B. Aylesworth, K.C., and *I. F. Hellmuth*, for the appellants, contended that there had been misdirection in saying it was an absolute duty on the defendants to ring a bell and shew a light: *Shea* v. *St. Paul City R.W. Co.* (1892), 50 Minn. 395; that there was no higher duty on the railway company than on the driver of an ordinary vehicle; that seeing the slow rate at which the defendants' car was going at the time the accident happened, there was no negligence on the defendants' part, and there was contributory negligence on the plaintiff's part; that head lights were carried for the sake of the driver and not for the sake of the public, and that, moreover, the evidence shewed that there was some light in the car.

T. H. Lennox and *S. B. Woods*, for the plaintiff, contended that the defendants were bound to give warning, if necessary, by bell or by light; that there was no contributory negligence, as the plaintiff could not have seen the danger if he had

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turned round: Shearman & Redfield on Negligence, 5th ed., sec. 485*b*; *Unger* v. *Forty-second Street and Grand Street Ferry R. R. Co.* (1873), 51 N.Y. 497; *Smedis* v. *Brooklyn Beach R.R. Co.* (1882), 8 Am. & Eng. R.R. Cas. 445; *Cooke* v. *Baltimore Traction Co.* (1894), 80 Md. 551; *Hollinger* v. *Canadian Pacific R.W. Co.* (1892), 21 O.R. 705; *Peart* v. *Grand Trunk R.W. Co.* (1884), 10 A.R. 191, at p. 211, 212; *Sornberger* v. *Canadian Pacific R.W. Co.* (1897), 24 A.R. 263; Beven on Negligence, 2nd ed., at p. 50; Ont. Statutes, 1897, p. 697, clause 30 of agreement between the defendants and the county of York.

Hellmuth, in reply.

April 10. OSLER, J.A.:—Action for negligently managing a car of the defendant company, and thereby running down and injuring the plaintiff.

The defendants deny that there was any negligence on their part, and say that the accident happened in consequence of the plaintiff's own negligence.

The case was tried before Robertson, J., and a jury on March 21st, 1901. The plaintiff recovered judgment for $1,800 damages with costs. The defendants appeal.

The defendants are a street railway company, incorporated under 60 Vict. ch. 92 (O.), and other Acts, operating their railway in the city of Toronto and the county of York and other municipalities.

It passes through the villages of Thornhill and Richmond Hill, in the county of York, being constructed on the ancient public highway known as Yonge street, at first and for a considerable distance from Toronto, on the west side, and then passing over to the east side of that street.

By the agreement between the company and the county of York, dated April 6th, 1894, which is incorporated in and made part of the above contract, it is provided that all persons using those parts of Yonge street on which the company is authorized to lay its tracks shall be at liberty to travel upon any portion of the travelled roadway occupied by the company's railway in the same manner as upon other portions of the highway; and vehicles of every description are to be allowed

thereon, it being provided, however, that the company's cars shall have the first right of way over the said railway, and that persons walking or driving shall turn out upon meeting or being overtaken by any of the company's cars, so as to give them the full right of way.

The railway is operated upon a single track, the passing of cars going in different directions, north and south, being provided for by means of switches at various points on the line.

The plaintiff is a farmer, residing near the village of Thornhill, and on May 24th, 1900, he went to the village of Richmond Hill (north of Thornhill) on one of the company's cars, returning home in the same way in the evening about 8 p.m. He left the car at the Thornhill waiting-room; when he arrived there the night was quite dark. He walked back a little distance towards the village to see a friend there on some business. At this part of their line the company's track is on the east side of Yonge street, the waggon track being on the west, and the road ditch immediately on the east of the track. On a bank above the ditch is a side walk, which was said to be considerably out of repair and not convenient of access. The plaintiff walked for some distance along the railway track, which is smoother and more convenient in many parts for pedestrians, and is commonly used by them. Then he moved into the waggon track, intending to cross the road when he got as far as his friend's house, which is on the west side of Yonge street. After walking a little further on the latter track, he moved in towards the west rail of the railway track to avoid some vehicles which were approaching him from the north, and as the latter passed him he was struck and knocked down by a car which was backing up along the track, and somewhat seriously hurt. This occurred at a point perhaps about 100 yards north of the waiting-room. There is a switch about a quarter of a mile to the north, and another about a mile to the south of the waiting-room. The car by which the plaintiff was struck was the same one in which he had come down; instead of waiting at the north switch for the north-bound car, it had proceeded for some distance south, after he left it, in order to wait at the south switch, but meeting with two north-bound cars about 100 yards (Keilty, plaintiff's witness, says about

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200) or more south of Thornhill, it was obliged to change its direction, and was backed up to take the north switch, and enable the other cars to pass it there.

The plaintiff said there was no headlight at the rear of the car thus moving backward, and that no gong or bell sounded; that the light at the other end of the car was very dim, and cast no reflection which gave him warning of its approach. It was said that when in good order the headlight should cast a warning light 80 or 150 feet ahead of it.

The cars on the defendants' road being constructed with a vestibule and controller and headlight at each end, can run in either direction without being turned round. Plaintiff said he heard a slight noise, but did not know that it was the noise of the car returning. He thought it had to go to the south switch, and heard no increased noise. The noise he heard was, he supposed, that of the car going south.

For the defence, it appeared from the evidence of the motorman and conductor that such light as there was, was very dim both inside and outside the car, the current being extremely weak. The former said that he turned on the headlight. He also said that the night was very dark, and that he did not see the plaintiff until he was within four or five feet of him. On account of the weakness of the current they were necessarily running very slow, not more than three or four miles an hour. There was no attempt to prove that the gong or bell had been sounded, or that any special warning was given of the movement of the car. Two witnesses spoke of the plaintiff having crossed from the east rail towards the west as the car was within four or five feet of him.

Questions were submitted to the jury, which, with their answers thereto, are as follows:—

Q. Was the plaintiff injured by one of the cars of the defendant company? A. Yes.

Q. If so, was the injury caused by reason of the negligence of the defendant company? A. Yes.

Q. If it was by reason of negligence, in what did that negligence consist? A. No headlight; no bell or gong sounded; no light inside of car; no proper warning of return of car

north; no instructions to conductor of car when to cross at the different switches.

Q. Was there a reasonable headlight at the front or north end of the car when it was proceeding northward or backing up from the station? A. No.

Q. Was the bell or gong sounded immediately before the accident, or had the plaintiff any warning of the approach of the car? A. No.

Q. If the plaintiff was guilty of negligence, could the defendant by the exercise of reasonable care have avoided the accident? A. Yes.

Q. Was the plaintiff guilty of negligence, and if yes, in what did that negligence consist? A. No.

Q. Could the plaintiff by reasonable care have got out of the way of the car at the time of the accident? A. No.

Q. What sum do you assess in damages in any event? A. $1,800.

The defendants contend that there was no evidence of negligence on their part. That the plaintiff's own negligence was the cause of his injuries. They also complain of misdirection and non-direction on the part of the learned trial Judge, and they say that in any event the damages are excessive.

As regards the question of negligence, I am clearly of opinion that the learned trial Judge could not properly have withdrawn the case from the jury. The facts proved were for their consideration, and it was for them to say whether they shewed negligence on the defendants' part, or contributory negligence on the part of the plaintiff.

As to the former: the measure of the defendants' duty is stated with sufficient accuracy in one of their reasons of appeal, viz., having regard to the circumstances of time and place, and the danger to be apprehended, they are required to take reasonable precautions, and to give reasonable warning of the approach of their cars.

The time was night—a dark night—the evening of a public holiday; the hour not very late, so that travellers were not unlikely to be abroad. The place was in or near a village; a public highway where people had the right to be walking or riding. The car was proceeding in an unusual direction, or

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rather in a direction in which the plaintiff had no reason to expect it would be going. It was going very slowly, it is true, but for that very reason was making less noise and thus giving less warning of its approach. Yet the defendants gave no other warning. They excuse themselves for the absence of light by the failure of the electric current, but the jury may very reasonably have thought that this only made it the more incumbent on them to give notice of the approach of the car by sounding the gong. The plaintiff's accident was, therefore, fairly attributable to the absence of some such warning; unless it could be said that it was caused by his own negligence or contributory negligence.

As to this the jury have found in his favour, and, I think, properly so. He was walking where, by law, he had the right to walk. He had reason to expect warning of the approach of a car, and he had no reason to expect that this particular car would have returned to the north switch. He might well have attributed such noise as he heard to the movement of the same car proceeding, as he supposed, on its southward journey; and his attention was distracted by the vehicles driving down towards him, of which he had to keep out of the way.

The findings of the jury in these two aspects of negligence are well supported by the evidence.

I do not see that there was any misdirection of which the defendants can complain. Some remarks are found in the charge which the learned Judge would probably have desired to correct had his attention been called to them; but, under the circumstances, we cannot say that they now call for notice.

The Judge, I think, properly explained to the jury the respective rights of the public and of the company on the highway. He was not bound to tell them that if the car was moving only at the rate of three or four miles an hour there was no higher duty upon the company to give notice than would be cast upon a person driving a waggon or other vehicle. And I do not think that any observation as to its being the duty of "the car" going north to have remained at the south switch until the other had passed it there, was at all likely to have misled the jury in dealing with the other plain facts of the case.

There remains the question of damages. The jury gave $1,800. The plaintiff's expenditure has been perhaps $100. His sufferings were severe, and he was confined to the house for several weeks. No bone was broken, and his permanent injury seems likely to be a certain flattening of the foot, some degree of lameness, and a possible tendency to rheumatism.

I cannot but think that the sum awarded by the jury is largely in excess of what has been given in the case of much more serious injuries, although, no doubt, we cannot say that there is a standard of damages in such cases.

I favour granting a new trial, unless the plaintiff consents to the judgment being reduced to $900. In that event, the appeal should be dismissed with costs.

If the plaintiff does not agree to this course, then new trial and cost of appeal to defendants, and other costs in the cause.

ARMOUR, C.J.O., and MACLENNAN, and MOSS, JJ.A., concurred.

LISTER, J.A., died before judgment was delivered.

A. H. F. L.

[DIVISIONAL COURT.]

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Jan. 8.
April 26.

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Partition—Parties—Lease by Infant Tenant in Common—Repudiation—Ouster—Mesne Profits—Damages.

Plaintiff, while an infant, joined with an adult brother and sister in a lease of a property, in which all three were tenants in common, for a period of ten years to the defendants, a street railway company, who pulled down some old buildings, put up pavilions, made roads and paths, turned it into a pleasure ground, ran a branch of their electric railway into it, and brought crowds of people there.

During the term he came of age, and at once repudiated the lease, and effected a partition with his co-tenants of the land, to which the company were not parties.

In an action by the plaintiff against the railway company only for possession of his part of the land under the partition, and that the partition might be declared binding, or for a new partition between him and the company, and for a declaration that the lease was not binding on him, and that he had been excluded from possession, and for mesne profits and damages:—

Held, that the partition made could not be declared binding on the company, who were not parties to it, and that the brother and sister were not necessary parties to any new partition between the plaintiff and the company.

Held also, on the evidence, that the company's conduct in the use of the park was practically an exclusion of the plaintiff from any use he might make of it, and that he was entitled to recover mesne profits from the time he became of age and damages, and a partition was ordered between him and the company for the residue of the term.

Judgment of Meredith, C.J., reversed.

THIS was an appeal by the plaintiff from the judgment of Meredith, C.J.C.P., at the trial, in an action in which Neville Monro was plaintiff and the Toronto Street Railway Co. were defendants.

The following statement of facts is taken from the judgment of STREET, J., in the Divisional Court:—

The plaintiff and one Francis John Monro, and one Amy Monro, were tenants in common on 1st May, 1896, in equal shares of a property called "Munro Park," and on that day they executed a lease for ten years of the property to the defendants, reserving an annual rent.

The plaintiff was an infant at that time, and when he attained the age of twenty-one years, on 10th August, 1900, he at once notified the defendants that he repudiated the lease and would not be bound by it.

The defendants have erected pavilions for dancing and other purposes, swings, boathouses, merry-go-rounds, and other attractions; and have run a line of their railway into it for the purpose of taking visitors to and from the park, and during the spring, summer, and autumn they carry throngs of people to the park by their railway for purposes of amusement. They have pulled down a barn and outhouses which stood upon the park at the date of their lease, and have removed a small house from one part of the ground to another.

After he came of age, the plaintiff and the other two tenants in common agreed to have the property partitioned amongst themselves, and a partition was effected and conveyances executed, by virtue of which the plaintiff is now seized in fee simple of a strip of land running through the centre of the park from north to south, and the other two are entitled to the strips on either side of the plaintiff's, also running from north to south of the park.

The defendants were not parties to this division: they have paid the other two owners each one-third of the rent reserved by the lease, and have offered to pay the plaintiff the other third, but he has refused to take it, and they plead their willingness to pay it to him.

The plaintiff brings the present action asking that the Toronto Railway Co., who are the only defendants, may be ordered to give him possession of the lands which have been conveyed to him in severalty by the other tenants in common; and that the partition may be declared binding upon the defendants; or in the alternative, that a partition may be made between him and the defendants; for a declaration that the lease of 1st May, 1896, is not binding upon him; for a declaration that he has been excluded by the defendants from possession; to recover mesne profits since he attained his majority and repudiated the lease; and damages for waste and further relief.

The defendants set up in their statement of defence, that they are entitled to retain possession of the lands as against the plaintiff, in right of their lease from F. J. Monro and Amy Monro, and that no partition binding upon them had been made: they denied that they had ousted the defendant or had

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committed waste, or had done any act which, as owners of an undivided two-thirds interest under the lease, they were not entitled to commit.

The action was tried at Toronto at the autumn non-jury sittings, on October 2nd, 1901.

C. Millar, for the plaintiff.
James Bicknell and *James W. Bain*, for the defendants.

Evidence was given of the facts above set forth, and that the portion of the land allotted to the plaintiff in the partition between him and his co-tenants was the more valuable of the three parcels.

The following judgment was delivered on 8th January, 1902:—

MEREDITH, C.J.:—It is clear, I think, that the plaintiff is not entitled to have the partition which has been made between him and Francis John Monro and Amy Monro of the lands mentioned in the pleadings declared to be binding on the defendants.

The defendants are lessees for a term of ten years from the 1st April, 1896, and according to the contention of the plaintiff, their lease does not affect either the undivided interest which he had in the lands before the partition, or the part of the lands which was allotted to him in severalty, in the partition which has been made.

The defendants were not parties to the partition and are not bound by it, even if it had been fairly and equitably made, which, if their interests under the lease are to be affected by it, I think it was not: *Cornish* v. *Gest* (1788), 2 Cox 27; *Wills* v. *Slade* (1801), 6 Ves. 498; *Baring* v. *Nash* (1813), 1 V. & B. 551.

The plaintiff may, however, be entitled to partition as between him and the defendants, as assignees of his co-tenants, for the yet unexpired term of the lease, but no case is made for that relief on the pleadings, nor is it specifically claimed.

I thought at the trial, that it would be proper to allow the plaintiff to amend by claiming that relief and pleading the

facts necessary to entitle him to it, and that I might determine the rights of the parties on the amended pleadings, but the defendants objected to that course being taken and insist that Francis John Monro and Amy Monro, if the amendment be made, will be necessary parties to the action, and should be added as parties, and that it will be necessary for the defendants to amend their pleadings to meet the new case proposed to be set up, which will, as they contend, raise new and difficult questions not in issue on the pleadings as they now stand.

In this I think that the defendants are right, and I therefore give leave to the plaintiff to amend by adding parties and otherwise as he may be advised; and to the defendants to amend as they may be advised: and I postpone the trial of the action on the amended pleadings, and reserve all questions as to the disposition of the costs occasioned by the amendment and postponement to be dealt with by the Judge before whom the action is ultimately tried.

If the plaintiff does not desire to amend on the terms I have mentioned, the case may be spoken to.

The plaintiff having elected not to amend his pleadings, the matter was again spoken to on 31st January, 1902, and the following judgment was entered:—

1. This action coming on for trial on the 2nd day of October, 1901, before this Court, at the sittings holden at the city of Toronto for the trial of actions without a jury, in the presence of counsel for both parties, upon hearing read the pleadings, and upon hearing the evidence adduced and what was alleged by counsel aforesaid, this Court was pleased to direct that this action should stand over for judgment, and coming on this day for judgment, and it appearing to this Court that this action is defectively constituted:

2. This Court doth not see fit to make any order save that this action do stand adjourned, with liberty to the plaintiff to amend the pleadings and proceedings herein by adding Francis John Monro and Amy Monro as parties hereto, and by otherwise amending the statement of claim herein as he may be advised, with leave to the defendant company to amend its defence as it may be advised.

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3. And this Court doth further order that the questions of costs of the amendment and postponement of the trial be reserved to be disposed of by the Judge before whom this action is ultimately tried.

4. But in the event of the plaintiff failing to amend in manner aforesaid before the 28th day of February next, this Court doth order and adjudge that this action do stand dismissed out of this Court with costs to be paid by the plaintiff to the defendants forthwith after taxation thereof.

The plaintiff appealed from this judgment, and his appeal was argued on March 5th, 1902, before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., and STREET, J.,

C. Millar, for the appeal. The action is rightly constituted, and there is no necessity for adding the other two tenants in common as parties. The parties interested are before the Court: *Mason* v. *Keays* (1898), 78 L.T. 33: *Baring* v. *Nash*, 1 V. & B. 551, at pp. 556 and 557; Calvert on Parties, p. 197. The plaintiff is entitled to partition upon making one interested party a defendant, and the other parties interested may be brought in in the Master's office under Con. Rule 956. I refer also to *Doe d. Wawn* v. *Horn* (1838), 3 M. & W. 333.

James Bicknell, contra. The plaintiff is not interested in the whole land; he only owns one-third, subject to the defendants' lease. He is a tenant in common with the defendants, and has not been ousted. The defendants' occupation of the whole is no ouster, and there has been no refusal of his rights. No act of the defendants can be construed into an ouster. I refer to *M'Mahon* v. *Burchell* (1846), 2 Ph. 127; 5 Ha. 322; *Griffies* v. *Griffies* (1863), 8 L.T.R. 758; 11 W.R. 943; *Tyson* v. *Fairclough* (1824), 2 S. & S. 142; *Jacobs* v. *Seward* (1872), L.R. 5 H.L. 464; *Job* v. *Patton* (1875), L.R. 20 Eq. 84; 3 Bl. Com. (Lewis), ch. 10, p. 167.

Millar, in reply.

April 26. The judgment of the Court was delivered by STREET, J.:—The defendants are lessees until 1st April, 1906, of two undivided thirds of the land; the plaintiff is entitled to a share of the land in severalty by virtue of a partition,

subsequent to the lease, between himself and Francis John Monro and Amy Monro, who were tenants in common with him, and who had leased their two undivided thirds to the defendants.

The plaintiff brings the present action against the lessees asking that the partition already made be declared binding upon them, or that a new partition be made between him and the lessees.

It is clear that we cannot declare the partition binding upon the defendants, who were not made parties to it. The only question upon this part of the case is whether we can order a partition of the land between the plaintiff and defendants for the remainder of the defendants' term, without having Francis John Monro and Amy Monro added as parties.

In my opinion, they are not necessary parties to such a partition; they have no interest whatever in any part of the land until the expiration of the defendants' lease, and the partition asked for by the plaintiff can only remain in force during the term of lease. When the term expires, the partition already made between the plaintiff and his co-tenants comes into force. At present the plaintiff holds no land in severalty as against the defendants, for he and they are tenants in common of the whole of it during the remainder of the term.

What he asks is that one-third of the land may be set apart for him, to be held by him in severalty only until the defendants' rights expire, and in this the other parties have no concern.

In my opinion, therefore, with great respect, the judgment appealed from is wrong in assuming Francis John Monro and Amy Monro to be necessary parties, and in directing the dismissal of the action because the plaintiff refused to add them: *Baring* v. *Nash*, 1 V. & B. 551; *Mason* v. *Keays*, 78 L.T. 33.

The remaining questions are as to the plaintiff's right to recover for mesne profits and for the destruction of the buildings which the defendants have pulled down.

This right depends upon the question as to whether the plaintiff has been excluded by the defendants, for there has been no actual receipt of rent by the defendants: *Henderson* v.

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Eason (1851), 17 Q.B. 701; *Murray* v. *Hall* (1849), 7 C.B. 441. So long as one tenant in common is only exercising lawfully his rights as a tenant in common, no action lies against him for trespass; but if his acts are equivalent to an exclusion of his co-tenants, then there is an ouster, and trespass will lie: *Goodtitle* v. *Tombs* (1770), 3 Wils. 118; *Doe d. Wawn* v. *Horn*, 3 M. & W. 333; *Wilkinson* v. *Haygarth* (1847), 12 Q.B. 837; *Stedman* v. *Smith* (1857), 8 E. & B. 1; *Jacobs* v. *Seward*, L.R. 5 H.L. 464.

The evidence in the present case is that the defendants having taken possession of the whole property, which before that time appears to have had a small house and barn and outhouses upon it, and had been rented to tenants, proceeded to convert it into a large pleasure ground.

They pulled down or removed the existing buildings upon it, and built others for dancing and other purposes; they ran roads and cinder paths through it; they ran a branch of their electric railway into it, built a station upon it, and brought thousands of people to it, during the fine weather, from Toronto.

The plaintiff demanded possession, and although possession was never refused him, it was never offered to him.

I think, that under these circumstances, however, the use made by the defendants of the property was practically an exclusion of him from any use which he could possibly make of it. A large part of it was cut up by roads and paths, and occupied by the defendants' buildings and railway line, and any use that the plaintiff could make of it must necessarily be interrupted by the swarms of visitors introduced by the defendants. Under these circumstances, I think the plaintiff is entitled to recover mesne profits since he became of age on 10th August, 1900, and damages for the destruction of the buildings which were upon the land when the defendants entered into possession.

The judgment entered should, therefore, in my opinion, be set aside, and judgment should be entered declaring the plaintiff entitled to a partition of the land, as between him and the defendants for the residue of the defendants' right of possession under the lease and ordering the same, and directing a

reference to fix the mesne profits and damages, and to tax to the plaintiffs their costs to the trial inclusive, and the costs of the present appeal.

Subsequent costs and further directions reserved until after report.

G. A. B.

[DIVISIONAL COURT.]

MORRISON v. GRAND TRUNK R.W. CO.

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Feb. 19.
March 8.
April 10.

Evidence—Discovery—Examination before Trial—Railway Company—Engine-driver—Consolidated Rule 439.

An engine-driver in the employment of a railway company is an officer thereof within the meaning of Consolidated Rule 439, and may be examined for discovery under the provisions of that Rule.

Knight v. *Grand Trunk R. W. Co.* (1890), 13 P.R. 386, overruled.

Leitch v. *Grand Trunk R. W. Co.* (1888), 12 P.R. 541, 671; (1890), 13 P.R. 369; *Dawson* v. *London Street R. W. Co.* (1898), 18 P.R. 223; and *Casselman* v. *Ottawa, Arnprior and Parry Sound R. W. Co.* (1898), 18 P.R. 261, considered and applied.

MOTION by the plaintiff for an order allowing her to examine as an officer of the defendants, an incorporated railway company, one William Spratt, the driver of the engine attached to a train of the defendants of which the plaintiff's husband was the conductor at the time of an accident which caused his death, on account of which the plaintiff brought this action for damages. The plaintiff had previously examined another person as an officer of the defendants.

Rule 439.—(1) A party to an action . . or in the case of a corporation, one of the officers of such corporation, may without any special order . . . be orally examined before the trial touching the matters in question, by any party adverse in interest . . .

(2) After the examination of one officer of a corporation, a party shall not be at liberty to examine any other officer without the order of the Court or a Judge.

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Master in Chambers.

The motion was heard by the Master in Chambers on the 18th February, 1902.

J. G. O'Donoghue, for the plaintiff.

D. L. McCarthy, for the defendants.

February 19. THE MASTER IN CHAMBERS:—The motion is opposed on the ground that the engine-driver is not an officer examinable under the Rule.

The Railway Act, R.S.C. ch. 109, sec. 85, provides that every company shall make such by-laws, rules, and regulations, to be observed by the conductors, engine-drivers, and other officers and servants of the company, as are requisite, etc.; sec. 85, sub-sec. 4, states "every conductor, engine-driver and other officer and servant of the company;" and in *Leitch* v. *Grand Trunk R.W. Co.* (1888), 12 P.R. 541, 671, (1890), 13 P.R. 369, the conductor was held to be examinable as an officer of the company.*

A conductor and a motorman of an electric railway were both held to be examinable as officers in *Dawson* v. *London Street R.W. Co.* (1898), 18 P.R. 223; and this latter case was followed in *Casselman* v. *Ottawa, Arnprior, and Parry Sound R.W. Co.* (1898), *ib.* 261.

In my opinion, the judgments holding that a conductor was an officer properly examinable, in *Leitch* v. *Grand Trunk R.W. Co.*, go so far as to hold that an engine-driver is also properly examinable; and, if any doubt exists as to this being so, I am of opinion that the judgment of a Divisional Court in *Dawson* v. *London Street R.W. Co.* sets the point at rest.

The duties of a motorman respecting an electric car are similar to those of an engine-driver respecting a steam car.

Had it not been for this decision, I should have—following the decision in *Knight* v. *Grand Trunk R.W. Co.* (1890), 13 P.R. 386—been obliged to refuse the order; but I feel that *Dawson* v. *London Street R.W. Co.*, being the later judgment and that of a Divisional Court, is binding upon me rather than that of *Knight* v. *Grand Trunk R.W. Co.*

* The statutory provisions quoted were those in force when the cause of action in the *Leitch* case arose; but they are not in the Railway Act of Canada, 1888.

The order will go for the examination of the engine-driver Spratt.

Costs to be disposed of by the taxing officer.

The defendants appealed from the order of the Master, and the appeal was heard by STREET, J., in Chambers, on the 28th February, 1902.

McCarthy, for the defendants. The order goes a step further than any case has yet gone. The engine-driver was not in charge of the train. *McLean* v. *Great Western R.W. Co.* (1878), 7 P.R. 358, and *Knight* v. *Grand Trunk R.W. Co.*, 13 P.R. 386, are not, I submit, overruled by *Dawson* v. *London Street R.W. Co.*, 18 P.R. 223.

O'Donoghue, for the plaintiff. The order is warranted by the cases cited by the Master. I refer also to *McCord* v. *Cammell and Co.*, [1896] A.C. 57; *McIntosh* v. *Great Western R.W. Co.* (1848), 2 DeG. & Sm. 758; *Ramsay* v. *Midland R.W. Co.* (1883), 10 P.R. 48; *Odell* v. *City of Ottawa* (1888), 12 P.R. 446; *Leach* v. *Grand Trunk R.W. Co.* (1890), 13 P.R. 467; and the cases cited in *Dawson* v. *London Street R.W. Co.*, 18 P.R. 223. The conductor being dead, the engine-driver is the only person living who knows anything about the cause of action, and he should be held examinable for discovery.

McCarthy, in reply. There is no evidence that the engine-driver knows anything about the cause of action. Affidavits on information and belief that he does know, not stating the source, should not be received: Rule 518; *In re J. L. Young Mfg. Co.*, [1900] 2 Ch. 753.

March 8. STREET, J.:—It appeared from the material that the deceased Morrison was the conductor in charge of a passenger train of the defendants, and while so in charge of it was killed. William Spratt was the engine-driver in charge of the engine upon the train in question at the time Morrison was killed. One Costello, the defendants' roadmaster at the place of the accident, was present and took charge of the train, in place of the deceased, when the train proceeded on its journey.

In considering the meaning to be attached to the word "officers" in Rule 439 and the subsequent Rules relating to

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examination for discovery, it appears to me to be important to bear in mind the provisions of sub-sec. (2) of Rule 461, which provides that "where an officer of a corporation has been examined under Rule 439 the whole or any part of the examination may be used as evidence by any party adverse in interest to the corporation, and shall be evidence accordingly," with a right on the part of the corporation to put in explanatory parts.

Under this Rule the examination of every one who is examined as an officer of the corporation is treated as evidence against the corporation, in the same manner and to the same extent as the examination of a party is treated as evidence against himself.

The result is, that a plaintiff in an action against a corporation has the advantage in many cases of giving important evidence against the defendants by means of the depositions, taken out of Court, of so-called "officers" of the corporation, who may be unfriendly to it, and who are not seen by the jury unless called by the corporation as its own witnesses.

Having in view these results of the examination of officers of a corporation, we should not, it appears to me, extend the meaning of the Rule under which they are examined to any class of employés without being satisfied that they properly come within it.

In *Leitch* v. *Grand Trunk R.W. Co.*, reported in 12 P.R. 541, 671, and 13 P.R. 369, it was held by MacMahon, J., in Chambers, and by a Divisional Court, that the conductor of a train of the defendants was an officer of the corporation and examinable for discovery. In the Court of Appeal the Court was equally divided upon the question, the Chief Justice and Mr. Justice Burton being of opinion that he was not examinable as an officer. The grounds upon which it was considered by the Divisional Court and by Osler and Maclennan, JJ.A., that the conductor was examinable, were that he was intrusted by the company with the charge of their train in its transit, and that he was, therefore, for that particular occasion and purpose, to be treated as an officer.

These reasons do not appear to me to be applicable to the position of the driver of the engine attached to the train, for he, as well as the brakesmen, is not in charge of the engine or the cars during the journey, but is under the control of the conductor.

In *Knight* v. *Grand Trunk R.W. Co.*, 13 P.R. 386, it was expressly held by MacMahon, J., that an engine-driver was not examinable as an officer.

In *Dawson* v. *London Street R.W. Co.*, 18 P.R. 223, upon which the learned Master relies, it was held that both the conductor and motorman upon a motor car upon the defendants railway were examinable: but it appeared from a by-law of the company that both of them were in charge of the car while it was in transit.

In *Casselman* v. *Ottawa, Arnprior, and Parry Sound R.W. Co.*, 18 P.R. 261, I held that a roadmaster of the defendants, who had direct superintendence of a section of their line, with men under him, was examinable as being the officer in direct control of that part of the line, although he was under the orders of the engineer of the company.

None of these cases seems to me to extend the principle upon which a conductor was admitted by the Courts to be treated as an officer of the company. The principle would undoubtedly be extended at once to employés of an inferior grade, and the difficulty of drawing a line anywhere would be greatly increased, if we were to hold an engine-driver examinable under the Rule.

I am, therefore, of opinion that the appeal should be allowed with costs, and that the order of the Master should be set aside with costs, both sets of costs to be taxed to the defendants in any event.

An appeal by the plaintiff from this judgment was argued by the same counsel on the 9th of April, 1902, before a Divisional Court [BOYD, C., FERGUSON, and MEREDITH, JJ.]

April 10. BOYD, C.:—The circumstances of this case are peculiar. The train was in charge of the conductor and engine-driver, the former as superior officer. When the conductor was

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killed by the accident under consideration in this litigation, the engine-driver was practically in charge of the train for the time being. He is the man who presumably knew at first hand how the accident happened, and is, in this regard, the proper person to make discovery. He is also "an officer" of the company, recognized as such, and so named, in the Railway Act, R.S.C. ch. 109, secs. 85 (1), 141, etc. See also 51 Vict. ch. 29, secs. 214 (9), 243 and 292. He comes within the definition of "officer" given in *Dawson* v. *London Street Railway Co.*, 18 P.R. 223. We are more than justified by the decisions in *Casselman* v. *Ottawa, Arnprior and Parry Sound R.W. Co.*, 18 P.R. 261, and *Odell* v. *Ottawa*, 12 P.R. 446, in reversing the order appealed from and restoring that of the Master.

Costs of application and appeal to be in the cause.

I may note that on this appeal the book of the company's rules was put in evidence, which was not before my brother Street, and of them the following rules indicate that both officers are regarded as in charge of a train: Rules 50, 52, 53, 232, 453, 466, 469 and 477.

FERGUSON, J.:—I agree.

MEREDITH, J.:—The one question for consideration is whether the engineer is an officer of the defendants within the meaning of the words "one of the officers of such corporation" used in Consolidated Rule 439.

One who commands an army is called an officer, but so, too, is one who commands even a file of men; the general manager of the railway is an officer of the defendants, but so, too, may be he who has but few or even one man under him; and so, too, may be one who fills any office, though it gives no command over others. It is a word applicable to many situations. One may be none the less an officer because he is a servant; the general manager of the railway is a servant of the company; nor is one any the less an officer because he may be subordinate to other officers. The position of the defendants in these respects is comparable rather to an army than to—for instance—"a one man corporation." It has its general offices and officers with their staff, and its divisional officers with their staffs, and so on

through the various grades of officers down to the "section boss," with no more, perhaps, than a corporal's guard under him. They are all officers, no matter what the office may be—none the less officers because petty officers.

That the "engineman," as he is named in the defendants' rules, "engine-driver," as he is generally called and as named in the Railway Act, is an officer of the defendants seems to me quite plain. He is so designated in the Act. He is second in command or charge of the train to which his engine is attached, and, under the company's rules, has equal responsibility with the conductor in most things. In the absence of the conductor he is in sole control of the train, until relieved by order of the train master; the crew are all under him; and he is charged with all the duties of the conductor (who may be likened to the captain of a vessel) regarding the running of the train, the safety and welfare of the passengers, and the care of the company's property and interests in the train and its voyage or trip. All the engineers of a steamship are officers of the ship. The "engineman's" ordinary duties, apart from any train management, are onerous and important; and in the internal management of the engine, and the direction of his fireman, he is not subject to the control of the conductor or any train officer or man. It must be, I think, that he is an officer of some grade, not to be counted merely as of the rank and file.

Then, being an officer, why not examinable? The rule provides that one of the officers of a corporation may be examined without any order. That means any one officer of the company may be examined; that is the literal and obvious meaning of the words. The rule in effect says to the plaintiff, you may examine at your option any officer, but one only, so choose the best for the purpose, for if you are not satisfied with his examination you can have no other without the leave of the Court.

And, if that be so, there is no power to draw the line high up, or low down, in the grade of officers.

If there were, it would be most unsatisfactory to attempt to draw a line arbitrarily at any particular height or depth in any supposed scale of importance of officers. Attempting to do that has left the cases in their present confusing state. If it

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were drawn at officers capable of making admissions binding upon the company, it would, perhaps, be definite enough and satisfactory. But without in effect rescinding in part the rule, the plaintiff cannot be deprived of his right to examine any officer of the company.

And he now seeks an examination of the proper officer, for the engine-driver is the one officer who can make the disclosure sought. He alone can tell why the engine was put into that motion which caused the conductor's death. Whether it was done upon signal or without signal, and whether there was negligence in giving the signal, if given, or in moving without signal, if none were given. The only satisfactory discovery in this case can be had from this officer.

There is but one argument seeming to have weight against full effect being given to the words and meaning of the Rule, and that is the provision, in Rule 461, that part of the examination may be given in evidence at the trial by the opposite party.

But there will be found on consideration no substantial injustice in that; though no doubt it would be fairer to provide that parts of the depositions could be put in only in cases in which the person examined had authority to bind the company by his admissions; and that in other cases the whole of the depositions should be put in, if any.

Nothing but what is evidence relevant to the issue can be put in; nothing but what could be given in evidence at the trial; and as either party can call the officer, examined for discovery, as a witness at the trial, and so get in all his evidence and all proper explanations as to parts put in, and as the depositions, and all parts of them, are but, as any other evidence, to be taken for what the judge or jury may consider them worth, it is difficult for me to understand why Rule 461 should cause any great desire to avoid the full effect of Rule 439.

I am of opinion that the engine-driver is examinable, and that opinion is not based upon any circumstances peculiar to this case. I see nothing peculiar, as affecting this question, in them, because the engine-driver never actually took charge of the train; the superior officer, to whose orders all train officers were bound to conform, having, as he had power to do,

immediately appointed himself to the conductor's place. The question is not whether the engineer was or was not in the position of a conductor, but is, was he an officer of the company? If that were the question, the company's rules, approved, under the Act, by the Governor-in-Council, puts them upon very much the same footing.

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[BRITTON, J.]

IN RE SALTER AND THE TOWNSHIP OF BECKWITH.

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April 14.

Intoxicating Liquors—Local Option By-law—Directions to Voters—Motion to Quash—Electors' Status to Oppose.

A local option by-law named as one of the polling places a small unincorporated village; without specifying any house, hall, or place in the village. Polling had taken place at this village year after year at municipal elections, and any house or place in it could be easily found:—

Held, following *In re Huson and South Norwich* (1892), 19 A.R. 343, that the polling place was sufficiently defined.

But *held* also, that as directions to voters had not been, as required by the Municipal Act, secs. 142 and 352, furnished to the deputy returning officers, and as there was not clear evidence of the posting up under the direction of the council of the by-law at four or more public places, the by-law must be quashed, these not being irregularities cured by sec. 204, and the fact that no harm had, as far as shewn, resulted, being no answer.

The municipal council having decided not to oppose the motion to quash the by-law, certain electors were allowed, at their individual risk as to costs, to oppose it in the council's name.

Re Mace and Frontenac (1877), 42 U.C.R. at p. 76, followed.

MOTION to quash a local option by-law, argued before BRITTON, J., on the 3rd of April, 1902.

Watson, K.C., and *J. Grayson Smith*, for the applicant.

Maclaren, K.C., and *J. S. L. McNeely*, for the respondents.

April 14. BRITTON, J.:—This was a motion by P. P. Salter, a ratepayer of the township of Beckwith, to quash by-law No. 328 of said township, the by-law being what is called a local option by-law, passed under sec. 141 of the Liquor License Act, R.S.O. 1897, ch. 245.

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This prohibitory by-law was introduced in the council and had its first and second readings on the 11th of November, 1901; was voted on by the electors on the 6th of January, 1902, and, having been assented to by the majority of those who voted, was finally passed by the council on the 8th of February, 1902.

The total number of electors in the township is 571, of whom 354 voted, 193 for and 161 against the by-law; majority for the by-law, 32.

The council of the township upon being served with notice of this application took no action. It is the opinion of at least two of the members of the council for the present year, who have made affidavits, and judging from the want of action by the council in session after service of the notice of motion, it is the opinion of the majority, that some of the objections are well founded, and that the by-law should be quashed.

Mr. Maclaren appeared on behalf of certain interested electors, and desired to be heard for the township in opposition to the motion. Following the decision of the late Sir Adam Wilson in *Re Mace and Frontenac* (1877), 42 U.C.R. at p. 76, I allowed Mr. Maclaren to appear for the township and to argue this case for and at the cost of the electors by whom he was retained.

There are eighteen objections as set forth in the notice of motion; two were abandoned; some were not strongly urged, or were disposed of; it is necessary to notice only the following:—

1. That the by-law did not sufficiently name the places within the municipality for taking the votes, pursuant to sec. 338, sub-sec. 1, of the Municipal Act. Franktown is an unincorporated village within the municipality, and the by-law simply names "Franktown" as one of the polling places, without naming any house, hall or place in Franktown. It is a small village, wholly, and well, known to the electors. Polling took place there year after year at the municipal elections, and any house could be quickly and easily found in Franktown. I do not allow that objection. *In re Huson and South Norwich* (1892), 19 A.R. 343, is authority against the applicant.

2. That the by-law was not properly published in a newspaper as required by the Act. I think it was. The facts bring

the case on this point within *Re Pickett and Wainfleet* (1897), 28 O.R. 464.*

3. That the council did not put up a copy of the by-law at four or more of the most public places in the municipality. This is a serious objection in view of the facts. The affidavits shew that one copy was put up by Mr. McEwen. One copy was put up by P. F. Sinclair, who was and is a member of the council. He says he has been informed and believes that five copies of the by-law were duly posted, etc., and that he himself personally posted one copy at Scotch Corners in said township. Joseph Kidd, who was reeve of the township in 1901, swears as follows: "Copies of said by-law, with said notice appended, were posted up in at least five of the most public places in said township of Beckwith, namely, Franktown post office, Derry school house, Prospect post office, Kemp's blacksmith shop at Black's Corners, town hall at Black's Corners, all of which said notices I did personally see. I have also been informed and believe that said by-law, with said notice attached, was posted at the Scotch Corners in such township."

It will be noticed that no time is mentioned. It is not attempted to be shewn who put any of these copies up, or when, or by whose authority other than above stated. Apparently, the matter was not discussed in council or by the councillors either at or before or after any meeting.

It is different in that respect from what appears to have been done in reference to publishing the by-law and notice in a newspaper. Mr. Kidd was active in endeavouring to get the by-law passed, and now naturally and properly desires to have it sustained; and he would (if he could) have given more particulars of these copies—when, by whom, under what circumstances they were put up. The council apparently gave no authority to put these up, and, what is a somewhat singular fact, the active workers for the by-law, while they say the by-law and voting were talked about, do not speak about the copies posted up.

The applicant's objections to the voters' lists supplied, and to the voters who, it is alleged, had not the proper qualification,

*There was not a formal resolution directing publication in the newspaper in question.—REP.

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are not well founded. *In re Croft and Peterborough* (1890), 17 A.R. 21; *In re Pounder and Winchester* (1892), 19 A.R. 684, decide that the voters under the prohibitory by-law are the regular municipal voters and not necessarily freeholders or leaseholders such as only can vote upon money by-laws.

The objection that directions to voters according to Schedule "L," as required by the Municipal Act, R.S.O. 1897, ch. 223, secs. 142, 352, were not furnished to the Deputy Returning Officers is important. It is not pretended that this was done. Mr. Maclaren contends, 1st, that no harm was done, because if there had been, it would be evidenced by spoiled ballots. I hardly think that is the test. Voters are entitled to the information and direction which the statute provides, and ballots may have been wrongly marked and counted, although in no way spoiled.

2nd, that this is a mistake cured by sec. 204. I cannot say this omission did not affect the result. It perhaps did not. I cannot say, and ought not to be called upon to say, in the absence of any record by the council of what they did or intended to do in regard to conducting the voting on this by-law in accordance with the principles laid down in the Act, how the result was affected.

In so important a matter the council should have acted in carrying out details, and the action should have been recorded. It should not have been left to men, no matter how zealous and willing to do of their own mere motion what they thought necessary, and when the responsible corporate body neglect their duty, a by-law without such formality as the statute requires in the particulars above mentioned ought not to be forced, even upon the minority, if it so happens that in truth the majority of those who voted were really in favour of it.

This by-law, if allowed to stand, disturbs an existing order of things in a township, as distinguished from all other townships in the same county, and it cannot be repealed for three years. The quashing of it will not prevent a new by-law being submitted, if the electors desire it, and the council pass it; and if such a by-law is again submitted it should be done with such care on the part of the council, as to complying with the

statutory requirements, that the will of the electors when once known shall prevail.

For the reasons, 1st, want of proof of posting up by the council of the by-law; and, 2nd, omission to furnish any directions for the guidance of voters on this by-law, both as required by the statute, the by-law should be quashed, and with costs to be paid by the township; but the applicant is not to be allowed any costs upon the objections on which his motion fails.

There are many affidavits in regard to the qualification of voters. These affidavits are quite incorrect, although no doubt honestly made by deponents upon information and belief; costs of these are not allowed against the township.

R. S. C.

[IN THE COURT OF APPEAL.]

C. A.
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May 8.

MONTREAL AND OTTAWA R.W. CO. v. CITY OF OTTAWA.

Railway—Highway Crossing—Compensation to Municipality—Private Ownership of Highway—Construction of Railway—"At or near" City—Power to Take through County—Statutory Provisions.

The plaintiffs were authorized by 47 Vict. ch. 84 (D.) to lay out, construct, and finish a railway, from a point on the Grand Trunk Railway in the parish of Vaudreuil, in the Province of Quebec, to a point at or near the city of Ottawa, in the Province of Ontario, passing through the counties of Vaudreuil, Prescott, and Russell, and also to connect their railway with any other railway having a terminus at or near the city of Ottawa:—

Held, that "at or near the city of Ottawa" should be read as "in or near the city of Ottawa," and the plaintiffs were authorized to carry their line to a point in the city and to connect it with the line of the Canadian Pacific Railway Company in the city.

2. That the plaintiffs had power, by implication, to take their line into the county of Carleton.

3. That the portion of the Richmond road (or Wellington street) within the limits of the city of Ottawa which the plaintiffs' line crossed, was a public highway and not the private property of the defendants.

4. That the plaintiffs, having taken the proper proceedings under the Railway Act of Canada and being duly authorized to cross the highway, were not bound to make compensation to the defendants for crossing it.

Judgment of Boyd, C., 2 O.L.R. 336, affirmed.

AN appeal by the defendants from the judgment of Boyd, C., 2 O.L.R. 336, in favour of the plaintiffs in an action for an injunction to restrain the defendants from interfering with the construction and operation of the plaintiffs' railway at the Wellington street crossing in the city of Ottawa. The facts appear in the former report and in the opinions of the Judges of the Court of Appeal.

The appeal was heard by ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 30th and 31st January, 1902.

A. B. Aylesworth, K.C., and *Taylor McVeity*, for the appellants. The respondents have no right under their charter to construct or operate their railway within or through the city of Ottawa, and consequently no authority to construct or operate the same across or over the highway in question: 47 Vict. ch. 84 (D.); 53 Vict. ch. 58 (D.) They are not authorized to enter Ottawa, but only to construct their line to a point "at or near" the city, which cannot mean "in" the city; and

have no power to go through the county of Carleton. The crossing of a highway by a steam railway is a new and different use of the highway from that contemplated by the dedication of the land therefor, and imposes an additional burden upon the soil. Such use of the highway is not the giving of an easement to the public, but the acquisition of an exclusive right by the railway company. A highway cannot be so subjugated to the use of a railway without the consent of the owner of the soil or the exercise of the right of eminent domain with compensation, under the provisions of the Railway Act, and this even though the fee is in a municipal council: *Donnaher* v. *State of Mississipi* (1847), 8 Sm. & M. (Miss.) 649; *Williams* v. *New York Central R.R. Co.* (1857), 16 N.Y. 97; Wood on Railroads, pp. 724, 739, 740. By virtue of sec. 601 of the Municipal Act, R.S.O. 1897, ch. 223, and of 51 Vict. ch. 53, sec. 9 (O.), the ownership in the soil of that part of the highway across which the respondents' railway has been constructed has become vested in the appellants, and the respondents have no right to use it without the consent of the appellants or without expropriating a right of way over it: *Roche* v. *Ryan* (1891), 22 O.R. 107, at p. 109; *Regina* v. *Corporation of Louth* (1863), 13 C.P. 615; *County of Lincoln* v. *City of St. Catharines* (1894), 21 A.R. 370; *City of Toronto* v. *Metropolitan R.W. Co.* (1900), 31 O.R. 367. The authority conferred on railway companies by sec. 90 (*g*) of the Dominion Railway Act, 51 Vict. ch. 29, to make or construct railways in, upon, or across highways, is given merely as one of the general powers of such companies, and has no more potency than the power given by sec. 90 (*d*) to make, carry, or place railways upon the lands of any person on the located line of railway. The powers conferred by (*g*) to the same extent as those conferred by (*d*), are subject to the provisions of the sections of the Act under "Plans and Surveys" and "Lands and their Valuation." The Railway Committee of the Privy Council has no authority to expropriate any portion of a public highway or a right of way over a highway, but merely to hear and determine a dispute as to, and to regulate the mode, manner, and place of crossing: Dominion Railway Act, secs. 11 and 187; *City of Toronto* v. *Metropolitan R.W. Co.*, 31 O.R. 367 Nor

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does the order of the Railway Committee profess to expropriate. There is nothing in the Railway Act which prevents the application to a highway of the ordinary principles of expropriation, especially where the municipality has the freehold. This particular highway is just the same as the lands on which the municipal buildings stand. It is subject to the easement of way, but the soil is vested in the municipality. This highway is "land" within the meaning of the interpretation clause; there is nothing to shew that "land" means land other than streets or highways.

Wallace Nesbitt, K.C., and *W. H. Curle*, for the plaintiffs, the respondents. The respondents have a right to build the railway containing the highway crossing in question: 53 Vict. ch. 58 (D.); 54 & 55 Vict. ch. 96 (D.); 57 & 58 Vict. ch. 85 (D.); 59 Vict. ch. 25 (D.); 63 & 64 Vict. ch. 66 (D.); *In re Bronson and City of Ottawa* (1882), 1 O.R. 415. All the preliminary steps required by the Railway Act with regard to the location of the line of railway, such as the deposit of plans, profiles, and books of reference, duly approved, in the proper registry office and the department of railways and canals, have been taken, as is found by the Chancellor. The respondents have the right implied in their Act of incorporation to cross any highway on their line of railway without the consent of the municipality in which the highway is situated; and a general power to construct crossings over any highways intersected by their railway, is also given by the Dominion Railway Act, 51 Vict. ch. 29, secs. 90 (*g*) and 187. They have the right to cross the highway, but the method of crossing is subject to the approval of the Railway Committee: 51 Vict. ch. 29, sec. 187 (D.) The Committee has approved of the crossing in question by order of 14th March, 1901. The Committee has power to inquire into, hear, and determine any application, complaint, or dispute respecting a railway crossing over a highway, and is the proper tribunal designated by Parliament for the disposition of such matters. The decisions of the Committee are final, unless rescinded, varied, or revised by the Committee itself. They are enforceable in the same way as a judgment of the Exchequer Court: 51 Vict. ch. 29, secs. 11 (*h*), 17, 18, 21 (D.); *Re Canadian Pacific R.W. Co. and County and Township of*

York (1896), 27 O.R. 559, at p. 569. The provisions of the Railway Act with reference to the expropriation of land do not apply to the construction of a railway crossing over a highway. The fee or right of ownership in part of the highway is not required by a railway company for the construction of a crossing. Wellington street is a highway, is for the use of the public, and the respondents do not desire to acquire the exclusive right to the use of any portion of it, but merely to use it in common with the public: *In re Day and Town of Guelph* (1857), 15 U.C.R. 126, 130: *Mead* v. *Township of Etobicoke* (1889), 18 O.R. 438; *Regina* v. *Grand Trunk R.W. Co.* (1857), 15 U.C.R. 121, 123; *Municipal Council of Sydney* v. *Young*, [1898] A.C. 457; *Grand Trunk R.W. Co.* v. *City of Toronto* (1900), 32 O.R. 120. That portion of Wellington street upon which the crossing in question is situated is a highway within the meaning of the Dominion Railway Act, 51 Vict. ch. 29, sec. 2 (*g*). It has been dedicated to the public, and is municipal property like other streets in the city.

Aylesworth, in reply. We admit that we must find statutory authority for the contention that the railway company cannot make the crossing without compensation, and we find it in the Dominion Railway Act, in the sections headed "Lands and their Valuation." The constitutional provision is not the main reason for the American decisions. The whole question is discussed in *Great Western R.W. Co.* v. *Swindon and Cheltenham Extension Railway Co.* (1882), 22 Ch. D. 677.

May 8. ARMOUR, C.J.O.:—The Vaudreuil and Prescott Railway Company was incorporated by the Act 47 Vict. ch. 84 (D.), and was thereby empowered to lay out, construct, and finish a double or single railway, from a point on the Grand Trunk Railway of Canada, in the parish of Vaudreuil, in the Province of Quebec, to a point at or near the city of Ottawa, in the Province of Ontario, passing through the counties of Vaudreuil, Prescott, and Russell, and to connect their railway with the Grand Trunk Railway of Canada, in the parish of Vaudreuil, and also with the railway of any other railway company having a terminus at or near the city of Ottawa, and to enter into an agreement with the Grand Trunk Railway

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Company of Canada, or with any other railway company whose line of railway was crossed by the line of the company thereby incorporated, or with which it connected, at or near the city of Ottawa, for conveying or leasing to such company the railway of the company thereby incorporated, in whole or in part, or any rights or powers acquired under that Act, and also the surveys, plans, works, plant, material, machinery, and other property to them belonging, on such terms and conditions and for such period as might be agreed upon, and subject to such restrictions as to the directors might seem fit: Provided, that the said conveyances, leases, agreements and arrangements had been first sanctioned by a majority of two-thirds of the votes at a special general meeting of the shareholders called for considering the same, on due notice given.

By the Act 53 Vict. ch. 58 (D.) the name of the said company was changed from "The Vaudreuil and Prescott Railway Company" to "The Montreal and Ottawa Railway Company," but such change in name was not to alter or affect in any way the rights or liabilities of the company.

By the Act 54 & 55 Vict. ch. 96 (D.) the time for the completion of its line of railway was extended to the 1st day of July, 1894.

By the Act 57 & 58 Vict. ch. 85 (D.) the time for the completion of its line of railway was extended to five years from the passing of that Act.

By the Act 59 Vict. ch. 25 (D.) the time for the completion of its line was extended to four years from the passing of that Act.

And by the Act 63 & 64 Vict. ch. 66 (D.) the time for the completion of its line was extended to four years from the passing of that Act.

The present terminus of the plaintiffs' railway is at Ann street, the south-eastern boundary of the city of Ottawa, and the plaintiffs at present run their trains thence into the city of Ottawa over the Canada Atlantic Railway for the distance approximately of half a mile to the central depôt on the east side of the canal.

A plan and profile and book of reference shewing the extension of the plaintiffs' railway proposed to be made from

the present terminus at Ann street through the city of Ottawa westerly till it reaches the St. Lawrence and Ottawa Railway, and thence along that railway for some distance, and thence running by a curve across Wellington street or Richmond road to the Canadian Pacific Railway, was filed in the department of railways and canals on the 19th February, 1900, and in the proper registry offices on the 31st May, 1900, and evidence was given that a considerable amount of land had been purchased in order to this extension.

The Canadian Pacific Railway Company are the lessees of (or control) the St. Lawrence and Ottawa Railway, and also the plaintiffs' railway, and the Canadian Pacific Railway and the St. Lawrence and Ottawa Railway have the same terminus, which will also be the terminus of the plaintiffs' railway when the proposed extension is completed.

The Canadian Pacific Railway Company, on the 31st May, 1900, applied to the city of Ottawa for its approval of a crossing of the Richmond road (Wellington street) by their tracks just west of the present St. Lawrence and Ottawa tracks, stating that they required the crossing to be used in connection with their proposed belt line (that is, the proposed extension of the plaintiffs' railway) around the city, in order to bring their western passenger trains to the central station.

It was said that this application was made after the Canadian Pacific Railway Company had commenced to construct this crossing, and was made owing to the outcry raised about it by some of the citizens.

Then, on the 13th June 1900, a resolution was passed by the council of the city of Ottawa that permission be granted to the Canadian Pacific Railway Company to at once construct a level crossing over that part of Wellington street, formerly called Richmond road, just west of the present crossing of the St. Lawrence and Ottawa Railway tracks, on condition that the said company will execute an agreement with the city respecting said crossing, when the same has been prepared and approved by this council and the said company, and upon the further condition that if, at any time before the execution of the said agreement, this council by resolution requires it, the said company will take up and remove the said track from the said

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street and discontinue using same until again authorized to cross said streets with its tracks.

Thereupon the Canadian Pacific Railway Company proceeded with and completed that portion of the proposed extension of the plaintiffs' railway according to the said plan and profile from the St. Lawrence and Ottawa Railway across Wellington street or Richmond road to the Canadian Pacific Railway, and commenced to operate the same and continued to operate the same until the defendants removed the tracks from the said street, as hereinafter mentioned.

An agreement was prepared as mentioned in the said resolution, and a by-law was passed by the defendants on the 13th December, 1900, sanctioning the same, and authorizing their mayor to execute it on behalf of the corporation, upon and after the due execution thereof by the Canadian Pacific Railway Company, and granting authority and permission, so far as the defendants had power to grant the same, to the Canadian Pacific Railway Company, upon and after the execution of the said agreement, to lay and construct a track of the railway of the said company across Wellington street at the place designated in the said agreement, on the level, and to operate its railway over the same, upon and subject to the terms, conditions, and regulations set forth and contained in the said agreement.

On the 23rd January, 1901, the city clerk wrote to the superintendent of the Canadian Pacific Railway Company that he was instructed to inform him that at a meeting of the railway and lighting committee of the defendants the following resolution was adopted: That the Canadian Pacific Railway Company be notified that unless they signed the agreements with the city within ten days from that date the committee would recommend the rescinding of the resolution granting permission to the company to lay this single track on Wellington street and to erect the foot bridge across the waterworks aqueduct.

On the 30th January, 1901, the said superintendent answered this letter objecting to the agreement, and submitting an amended agreement which the Canadian Pacific Railway Company were willing to execute.

On the 4th February, 1901, the railway and lighting committee of the defendants reported to the council of the defendants that, as the agreements had not yet been signed, they recommended that the said resolution of 13th June, 1900, be rescinded, and the city engineer be instructed to blockade the tracks at the said crossing, and that the city solicitor be instructed to prepare a by-law repealing the above mentioned by-law; which report was adopted by the council; and on the same day a by-law was passed by the council of the defendants repealing the said by-law.

Thereupon the defendants, on the 28th day of February, 1901, removed the tracks of the said railway from the said street or road, and prevented the operation of the railway across it.

An application was thereupon and on the 7th day of March, 1901, made by the Canadian Pacific Railway Company, in the name of the plaintiffs, to the Railway Committee of the Privy Council of Canada for approval of plan and profile of its railway across the highway known as the Richmond road in the city of Ottawa. And on the 14th March, 1901, the following order was made: "The Montreal and Ottawa Railway Company, hereinafter called the company, having applied, pursuant to the Railway Act, 1888, to the Railway Committee of the Privy Council of Canada for approval of a plan and profile of its railway crossing the highway known as the Richmond road or Wellington street in the city of Ottawa:—The said Committee having heard counsel for the company, the city of Ottawa, the county of Carleton, and the township of Nepean, respectively, and having duly considered the evidence submitted on their behalf, hereby approve of the plan and profile. And the said Committee, having received the sanction of the Governor-General in Council, number P.C. 552, dated the 13th day of March, 1901, and the company by its counsel having consented thereto, require the company to protect at its own expense the said street or public highway by two gates, said gates to be in addition to the gates already erected by the Canadian Pacific Railway Company protecting certain crossings of that company over the said street or public highway, and to be placed and installed to the satisfac-

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tion of the Government chief engineer of railways and canals. If at any time the said Committee orders the said crossing to be removed, the company shall at its own cost remove the same. Provided that this order shall not in any way affect any application which may be now pending or hereafter made to the said Committee by the city of Ottawa, or any other party in interest, for an order for the further protection of the said crossing by the changing of the location of the tracks of the company, the construction of a subway, or otherwise."

The defendants support their action in removing the tracks of the said railway from the said street or road and preventing the operation of the railway across it, by alleging that there was no legislative authority for the construction of the railway across this street or road.

It was contended that the authority granted to the plaintiffs by their Act of incorporation was to construct their railway from a point on the Grand Trunk Railway of Canada in the parish of Vaudreuil, in the Province of Quebec, to a point at or near the city of Ottawa, passing through the counties of Vaudreuil, Prescott, and Russell, but that this gave no authority to pass through the county of Carleton, through which the railway would have to pass in getting to a point at or near the city of Ottawa; but the authority granted to the plaintiffs to construct their railway from a point on the Grand Trunk Railway of Canada in the parish of Vaudreuil to a point at or near the city of Ottawa, gave them, by necessary implication, the authority to pass through the county of Carleton, without which they could not reach a point at or near the city of Ottawa.

It was next contended that, having constructed their railway to the boundary of the city of Ottawa at Ann Street, they had constructed it to a point at or near the city of Ottawa within the meaning of the Act of incorporation, and that thus their legislative authority was exhausted, and they had no authority to construct the proposed extension.

But the word "at," although in its primary meaning it signifies near, yet when used with the proper names of places signifies in, and the words in the Act of incorporation "at or near," according to their proper construction, signify "in or

near," and the Act of incorporation, therefore, authorized the construction of the plaintiffs' railway to a point in or near the city of Ottawa, and also authorized its connection with the railway of any other railway company having a terminus at or near, that is, in or near, the city of Ottawa.

In my opinion, therefore, the Act of incorporation authorized the proposed extension of the plaintiffs' railway to a point in the city of Ottawa, and authorized its connection with the railway of the Canadian Pacific Railway Company in the city of Ottawa.

The plaintiffs, having filed their plans of the proposed extension and their book of reference, and having obtained the approval of the Railway Committee of their plan and profile of crossing Wellington street or Richmond road, were duly authorized to construct that portion of the proposed extension crossing Wellington street or Richmond road, and could lawfully authorize the Canadian Pacific Railway Company to construct the same for them and to operate the same for them, and as the lessees of their rights and powers.

The defendants also justify their action in removing the plaintiffs' railway from Wellington street or Richmond road on the ground that before the plaintiffs constructed their railway across that street or road they were bound to pay and still are bound to pay to the plaintiffs compensation for so doing.

In the year 1851 the Bytown and Nepean Road Company were incorporated under the Act 12 Vict. ch. 84, "An Act to authorize the formation of Joint Stock Companies for the construction of Roads and other Works in Upper Canada," for the purpose of constructing a plank or macadamized road, or both, from the town of Bytown, in the county of Carleton, to Bell's Corners, at the junction of the Richmond and Ramsay roads, in the township of Nepean, in the county of Carleton.

The Richmond road was at that time an existing common and public highway, the soil and freehold of which were vested in the Crown: *Attorney-General* v. *Bytown and Nepean Road Co.* (1851), 2 Gr. 626.

By the Act 12 Vict. ch. 84 it was provided that any number of persons not less than five, respectively, might in Upper Canada, in their discretion, form themselves into a company,

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under the provisions of that Act for the purpose of constructing in and along any public road or highway, allowance for road or otherwise, any sawed, hewed, or split plank, macadamized, or gravelled roads, not less than two miles in length; and it was thereby also provided that they and their successors, by their corporate name, should be capable of purchasing, taking, having, holding, and conveying, selling, and departing with, any lands, tenements, and hereditaments whatsoever, which might be or have been thought to be useful and necessary for the purposes of such corporation: and it was also thereby provided that every such road as aforesaid should be vested in such company and their successors.

By sec. 64 of "The General Road Companies Act," R.S.O. 1887, ch. 159, made applicable to this road company, it was provided that any company formed under that or any former Act might sell to any municipal council representing the interests of the locality through or along the boundary of which such road passed, and the municipal council might purchase, the stock of the company, or any part of the road belonging to the company, at the value that might be agreed on between the company and the municipal council; and the municipality might hold the same for the use and benefit of such locality, and should, after the purchase, stand in the place and stead of the company, and possess all such powers and authority as the company theretofore possessed and exercised in respect to the road or part of road purchased.

And by sec. 81 of the last mentioned Act, made applicable to this road company, it was provided that the company might by by-law abandon the whole or any portion of their road, and that after the abandonment of a portion of such road, the municipal council of any municipality, within which the road or any part thereof lay, might assume such abandoned portion of the road as lay within the municipality, and have and exercise the same jurisdiction over the same, and be liable to the same duties, as such council has or is subject to in respect to the public roads within its jurisdiction.

By the Act 51 Vict. ch. 53 (O.), "An Act to extend the limits of the City of Ottawa and to re-arrange the Wards thereof and for other purposes," sec. 9, after reciting that it had

been represented by the petitions of the Bytown and Nepean Road Company, the Nepean and North Gower Consolidated Macadamized Road Company, and the Ottawa and Gloucester Road Company, that portions of the road companies roads constructed by them would be and were embraced within the limits of the said city of Ottawa, as extended by that Act, it was thereby enacted that the corporation of the city of Ottawa should acquire so much of the said roads respectively as should be and were embraced within the limits of the said city as enlarged by that Act, and should pay the said companies for such portions respectively, and in case the said road companies and the said corporation did not, within six months after the passing of that Act, agree as to the amount of money to be paid for said portions of said roads as aforesaid or as to the time of payment, the matter should be settled by arbitration pursuant to the provisions of the Municipal Act.

It was shewn that on the 3rd December, 1889, there was paid by the defendants to the Bytown and Nepean Road Company the sum of $1,170, and that no conveyance had ever been made by the Bytown and Nepean Road Company to the defendants of that portion of their road then within the city of Ottawa.

The Richmond road was, at the time of the incorporation of the Bytown and Nepean Road Company, a common and public highway, and the effect of the Act 12 Vict. ch. 84 was not to vest this common and public highway in that company, but only to grant to them the statutory easement or right of constructing their road in and along it, and to vest the road so constructed in and along it in the company, the Richmond road still remaining, after the construction by the company of their road in and along it, a common and public highway, subject to the said statutory easement or right: *Regina* v. *Davis* (1875), 24 C.P. 575; R.S.O. 1887, ch. 184, sec. 531, sub-sec. 3.

The defendants, not having taken a conveyance from the company of that portion of their road within the city of Ottawa, were not in a position to exercise any of the powers (nor does it appear that they ever essayed to do so) of the company in respect of such portion, if indeed any such powers would have been exercisable in respect thereof by the defendants.

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The proper inference, in my opinion, to be drawn from the fact that the defendants paid the money to the company and took no conveyance from the company of that portion of the road within the city, and never sought to exercise any of the powers of the company in respect to such portion, is that they paid the money for the abandonment by the company of their rights in respect of such portion, and in extinguishment of such rights.

The effect of this was, that that part of Richmond road thereafter remained a common and public highway, free from the statutory easement or right existing thereon under the provisions of 12 Vict. ch. 84.

And there is nothing in the Railway Act which affords any ground for holding that the plaintiffs were or are bound to pay compensation for the crossing by their railway of any common and public highway.

In my opinion, therefore, the appeal must be dismissed with costs.

OSLER, J.A.:—In the case of *In re Bronson and City of Ottawa*, 1 O.R. 415, the question was considered whether a railway company, authorized by Act of Parliament to make a railway *from* the city of Ottawa to some point at or near the village of Alexandria, had the right to enter the city and construct the railway from a point within its limits, and I refer to the authorities there collected and the reasons which led me to the conclusion that the company had the right they claimed, as clearly supporting the plaintiffs' contention in the case at bar, that statutory authority to construct the railway to a point *at or near* the city of Ottawa also confers the right to carry it to a point within the city. I refer particularly to *Rex* v. *Norwich* (1719), 1 Str. 177; *Smith* v. *Helmer* (1849), 7 Barb. 416; *Commonwealth* v. *Erie and North-East R.R. Co.* (1856), 27 Pa. St. 339; *Morris and Essex R.R. Co.* v. *Central R.R. Co.* (1865), 31 N.J. 205; *Union Pacific R.R. Co.* v. *Hall* (1875), 91 U.S. 343; and *Mohawk Bridge Co.* v. *Utica and Schenectady R.R. Co.* (1837), 6 Paige 554. When the object of the grant of power to construct a great public undertaking such as a railway, and the nature of the interests intended to be promoted or served thereby, are considered, it will seldom be difficult, in

the absence of controlling expressions, to give terminal words their larger and inclusive meaning as being that which best accords with the intention of the Legislature.

The contention of the city that the railway company are bound to pay, or that the city is entitled to, compensation for crossing the highway in the line of railway, I regard as purely experimental, as it is certainly novel. The right to cross the highway is a definite right, expressly given by the Railway Act, to enforce which all that seems to be necessary is, that the map or plan or book of reference should be duly filed, so that the work of construction may be proceeded with. The expropriation sections of the Act, dealing with notice, valuation, and award, do not fit the case, nor is the municipality an owner of the highway, within the meaning of sec. 2 (*p*) and sec. 144 of the Railway Act. It can neither convey as owner, nor is it empowered to convey either the highway or any right in or over it to the railway company. The right of the railway company derives, not under the compensation clauses, but under sec. 183 of the Act, and the group of sections of which that is the first, defines the obligations and jurisdiction to which the company are subject in respect of the crossing. They neither take nor use the street *quâ* street. They are given the right to cross it, and provisions are made to guard against the crossing becoming an obstruction or a nuisance to the public.

The remaining point urged by the city is, that the Richmond road, where the plaintiffs crossed it, is a road acquired by the defendants from a former road company, the owners thereof, and is, therefore, not a public highway, within the meaning of the Railway Act, but, so to speak, a road owned by the city in the same sense that the company formerly owned it. The answer to this contention seems very plain, viz., that the Richmond road was originally laid out as a public highway, and that the rights of the Nepean Road Company therein have simply been abandoned or extinguished as the result of the transaction which took place between the company and the city.

I think the judgment of the Chancellor should be affirmed and the appeal dismissed with costs.

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MOSS, J.A.:—The plaintiff company is authorized by the Act 47 Vict. ch. 84 (D.) to lay out, construct, and finish a double or single railway, from a point on the Grand Trunk Railway of Canada in the parish of Vaudreuil, in the Province of Quebec, to a point at or near the city of Ottawa, in the Province of Ontario, passing through the counties of Vaudreuil, Prescott, and Russell, and also to connect its railway with the railway of any other railway company having a terminus at or near the city of Ottawa.

Acting under the powers conferred by this and several subsequent Acts, the plaintiff company has constructed a line of railway from Vaudreuil to the city of Ottawa, at a point near Ann street, in the south-eastern part of the city.

The Canadian Pacific Railway Company has a terminal station in the north-western part of the city of Ottawa, and the plaintiff company, for the purpose of connecting its railway with the railway of the Canadian Pacific Railway Company, has caused a survey and levels to be made and taken of the lands through which the railway is to pass across the city of Ottawa in order to effect the junction, together with a map or plan and profile thereof, and of its course and direction, and a book of reference, as directed by the Railway Act. The map or plan, book of reference, and profile have been duly examined and certified by the deputy of the Minister of Railways and Canals, and deposited with the department, and copies thereof have been deposited with the registrar of deeds for the city of Ottawa. The plaintiff company has also acquired or has under contract to purchase a portion of the right of way. The line of the railway as projected crosses a highway in the city of Ottawa, known as Wellington street or the Richmond road, and parts of the roadbed and line of rails have been constructed. The plaintiff company's undertaking is leased to or controlled by the Canadian Pacific Railway Company, and, under temporary arrangements with the city of Ottawa, the line of railway was carried across the Richmond road at rail level, but, owing to disagreements resulting in litigation, the city authorities removed the rails from the highway on the 28th February, 1901. The plaintiff company thereupon submitted a plan and profile of the portion of the railway crossing the said Richmond

road at rail level, to the Railway Committee for its approval; and on the 7th March, 1901, the Committee, after hearing counsel for the plaintiff company and the city of Ottawa and other municipalities interested, decided to approve of the plan and profile, but withheld the order until the sanction of the Governor-General in Council was obtained to certain directions with regard to protection at the crossing, and such sanction having been received on the 13th March, 1901, the order of the Railway Committee was issued on the 14th March, 1901.

In these circumstances, the plaintiff company was proceeding to lay its tracks across the Richmond road, when the city of Ottawa, by a show of force and threats of resistance, prevented the work, and the plaintiff company sought the intervention of the Court by means of this action.

The defendants seek to justify their action in several ways.

First, they say that the plaintiff company is not authorized to construct its line into or through the city of Ottawa. In support of this contention it is urged that the plaintiff company's only authority is to construct a line to a point at or near the city of Ottawa, and that this does not mean a point in the city. In dealing with legislation concerning a railway where a general course only is indicated by the incorporating Act, and the line is left to be traced and laid out on the ground after the passing of the Act, a certain latitude should be given to the language. Regard should be had to the object sought, and a reasonable construction should be adopted in order to give effect to the intention of the promoters of the railway. In this case the object was to open up railway communication between the parish of Vaudreuil and intervening points and the city of Ottawa. The recital to the Act 47 Vict. ch. 84 shews that, in the view of the promoters, such a line of railway would be greatly beneficial, as well to the general trade of the country, as to the population of the counties traversed by the line of the railway. To stop such a line at the confines of a large city would not be conducing to the furtherance of this end. Having regard to the subject-matter, I think the word "at" should be taken inclusively. And it seems to me there is nothing unreasonable in rendering the words "a point at the city of Ottawa" as "a point in the city of Ottawa."

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It must be conceded, I think, that if the language of the Act enables the plaintiff company to construct its line to a point in the city, that carries with it the right to go through or across the city to reach that point, unless that method of reaching it would be manifestly unreasonable in view of all the circumstances. Besides, the Act authorizes the plaintiff company to connect its railway with the railway of any other railway company at or near Ottawa, and if for the purpose of making such connection it was necessary for the plaintiff company to carry its line across the city, why should not this be done?

Next, the defendants say that, if the plaintiff is authorized to construct its line through or across the city, what is being done is not in furtherance of that design, but is nothing more than the laying of a short curve or link from the main line of the Canadian Pacific Railway to the line of the St. Lawrence and Ottawa Railway Company, a line also controlled by the Canadian Pacific Railway Company.

There is nothing in the Act of incorporation to prevent the work of connection from being commenced at either end, and the evidence, as well as the plan, profile, and book of reference, shews that the intention is to complete the work within the time limited by the last Act. Other questions may arise in the event of that not being done, but at present there appears to be no objection to the plaintiff company proceeding in the way it has been proceeding.

The defendants next contend that in order to construct the link or curve in question, the plaintiff company must extend its line into the county of Carleton, and that for this there is no authority in the Act of incorporation. It is true no mention is made of the county of Carleton, but I think that if, for the purpose of reaching its point in the city of Ottawa, or of making connection with another railway at or near the city of Ottawa, it becomes necessary to take the line into the county of Carleton, the plaintiff company's Acts, by implication, give power to do so.

The defendants next take the ground that, assuming the previous points to be determined in favour of the plaintiff company, it is not entitled to enter upon the Richmond road, or use it for the purposes of its railway, without first taking steps to acquire by agreement or expropriation a right of way over it,

and make compensation to the defendants therefor, because the part of the Richmond road in question is the private property of the defendants, and is not held by them as ordinary public highways are. It is shewn that from the year 1851 to the year 1888, the Bytown and Nepean Road Company held this portion of the Richmond road as part of its macadamized road, and that in the latter year an Act was passed by the Legislature of Ontario (51 Vict. ch. 53) which provided, amongst other things, for the extension of the limits of the city of Ottawa, and (by sec. 9) that the city should assume so much of the said road as should be embraced within the enlarged limits of the city, paying the road company for such portion. It is further shewn that under this provision the defendants did pay to the road company the sum of $1,170 as compensation for the portion of the Richmond road embraced within the enlarged limits, but no conveyance or transfer was executed to the defendants, and since that time the said road has apparently been used, treated, and dealt with by the defendants in the same way as the other streets and public highways of the city. The Act 12 Vict. ch. 84, under which the Bytown and Nepean Road Company was formed, enabled it to construct its projected road in and along any public road or highway or allowance for road, and to hold such constructed roadway and collect tolls from persons travelling thereon, and thus the right of the municipality to the control of the public highway was suspended, or rendered subsidiary to the control of the road company; but the soil and freehold were not vested in the latter. That the Richmond road was a public highway at the time of the formation of the Bytown and Nepean Road Company, is apparent from the company's charter, and there is no doubt it was assumed by the road company as a public highway, and was not acquired by purchase from private owners. See also *Attorney-General* v. *Bytown and Nepean Road Co.*, 2 Gr. 626.

In 1888 the defendants paid for the rights which the road company had gained by the construction of their roadway. I think the highest effect that can be given to the transaction of 1888 is that the interest of the road company was extinguished, and the highway was restored to the municipality of the defendants, which had acquired territorial jurisdiction over that part of the municipality of Nepean embracing the portion of the

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road in question. It follows, therefore, that the highway in question is not the private property of the defendants, nor to be regarded in the sense that property acquired and held for a city hall or a market house, or property like that in question in the case of *In re Bronson and City of Ottawa*, 1 O.R. 415, is to be regarded.

Lastly, the defendants contended that, in any case, even if the Richmond road is to be considered as an ordinary highway, yet under the Railway Act a railway company is not entitled to cross it in the line of its railway without the defendants' consent, save on condition of making monetary compensation to the defendants, and assuming the maintaining of the highway at the crossing as well as submitting to such terms and conditions as may be imposed by the Railway Committee.

I am unable to find in the Railway Act, or in any other enactment, any warrant for this claim. The Railway Act, throughout, deals separately with lands and highways. The expression "highway" in the Act includes any public road, street, lane, or other public way of communication: sec. 2 (*g*). The expression "lands" means the lands, the acquiring, taking, or using of which is incident to the exercise of the powers given by the general or special Act, and includes real property, messuages, lands, tenements, and hereditaments of any tenure: sec. 2 (*k*). The word "owner," where, under the provisions of the general or special Act, any notice is required to be given to the owner of any lands, or when any act is authorized or required to be done with the consent of the owner, means any person who, under the provisions of the general or special Act, or any Act incorporated therewith, would be enabled to sell and convey lands to the railway company: sec. 2 (*p*). The subsequent sections shew that special provision is always made for the case of highways affected by the exercise of the powers of the railway company, and they are not left to group themselves under the general head of lands, the owners of which may sell and convey them to the company.

Parliament has authorized railway companies to construct their railways across the lands of the Crown, and of private individuals and incorporated companies, but for these privileges it is expressly provided they must make compensation. They are also authorized to cross highways in the line of their rail-

way, but there is no express provision requiring that for the exercise of this privilege they shall either obtain the consent of the municipality or make compensation. The municipality may in some cases secure terms from the Railway Committee, but no provision is made for ordering monetary compensation for the user of the highway involved in crossing it at rail level. This privilege of crossing does not appear to fall within any of the classes of interests for which compensation is provided under secs. 136 to 172. In no case that I am aware of has a claim for compensation to a municipality for the user of a highway by a railway, arising from the mere crossing in the line of the railway, been presented or countenanced. The views of the Judicial Committee of the Privy Council, as expressed by Lord Morris in *Municipal Council of Sydney* v. *Young*, [1898] A.C. 457, seem opposed to such a claim. In *Donnaher* v. *State of Mississippi*, 8 Sm. & M. (Miss.) 649, cited for the defendants, the Supreme Court of Mississippi recognized the right of a municipality to compensation for the occupation of its highways longitudinally by the tracks of a railway. But the Courts of other States have maintained the contrary, even where the tracks were so laid without the consent of the municipality, it appearing that the construction of the railway was authorized by the Legislature having power to deal with it; and in the Courts of several States the opinion has been expressed that the right to cross highways is implied in the grant of the right to lay down and construct a line of railway, and that the exercise of such right creates no claim for compensation. With regard to the decision in *Donnaher* v. *State of Mississippi*, it is remarked in Dillon on Municipal Corporations, 4th ed., p. 834 (note), that the conclusion seems to have been adopted without sufficient reflection, and is undoubtedly erroneous.

I think the appeal fails.

MACLENNAN, J.A., concurred.

LISTER, J.A., died while the appeal was *sub judice*.

[The decision of BOYD, C., in *Canada Atlantic R.W. Co.* v. *City of Ottawa*, reported with his decision in the above case, 2 O.L.R. 336, was affirmed by the Court of Appeal, on the 16th May, 1902, for the same reasons as are given above.]

E. B. B.

[DIVISIONAL COURT.]

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1902
May 15.

REX v. ST. PIERRE.

Municipal Corporations—By-law—Transient Traders—Taking Orders for Goods—Conviction—Certiorari—Statute Taking away Right to—Want of Jurisdiction.

There is no power to pass a by-law or to convict under the transient traders' clauses of the Municipal Act in respect to a person living at an hotel and taking orders there for clothing to be made in a place outside of the municipality, out of material corresponding with samples exhibited.

Notwithstanding the amendment to sec. 7 of the Ontario Summary Convictions Act, by sec. 14 of 2 Edw. VII. ch. 12, taking away the right to *certiorari*, a conviction made by a magistrate without jurisdiction may be removed by *certiorari*; and where the offence for which a conviction is made is found not to come within the statute defining the offence, or the municipal by-law defining the offence is *ultra vires* of the statute which gives the power to pass a by-law, there is such absence of jurisdiction as warrants the issue of a *certiorari*.

ON the 5th March, 1902, an information was sworn before the police magistrate for the city of Ottawa, that William St. Pierre, of the city of Montreal, on the 5th March, 1902, at the city of Ottawa, then and there a transient trader, temporarily occupying premises in said city, and not being entered upon the assessment roll of the said city in respect of income or personal property for the then current year, did unlawfully offer for sale goods, to wit, ladies' clothing, within the limits of the said city of Ottawa, without having first duly taken out a license for that purpose, contrary to the by-law of the corporation of the said city of Ottawa in such case made and provided.

Being brought before the police magistrate on the 6th March, the defendant pleaded "not guilty." He admitted that he had no license, and that his name did not appear in the assessment lists of the city.

Joseph O'Meara, the informant, deposed that he was a detective; he met the defendant the day before in the Russell House (an hotel in the city of Ottawa) in room 95. He had samples of ladies' dress goods in the room. He had his goods spread out on chairs and a table. They were samples of cloth a few inches square. He said he was taking orders for clothing and sending them on from Montreal when made up. He had

the samples there for people to select the piece of cloth they wished to have the clothes made from. He did not say how long he was there. Cross-examined, O'Meara said that the door opened out of a bedroom and parlour in the hotel on to the corridor. The defendant said he delivered the goods in Montreal or sent them on to Ottawa to the address of the purchasers. The defendant said the ladies came and ordered the goods for their own private use, and he had a letter from a lady in Metcalfe street to come down and take her order.

Samuel St. Jacques deposed that he was a clerk in the Russell House. The defendant came to Ottawa on the 4th March, and was stopping at the Russell House. He engaged a sitting-room and a bed-room. He occupied the rooms by the day. He was a ladies' tailor in Montreal, and came up to Ottawa to do business in his trade. He hired the rooms for the purpose of doing business in his trade here. Cross-examined, St. Jacques said that the defendant rented the rooms the same as other guests. The rooms were under the control of the management of the house. They were attended to like the others in the house. The defendant rented these rooms by the day and had full control of them while he held them. He could sell goods or do any other thing which he might lawfully do in any other place.

By-law No. 1564 of the city of Ottawa provides:—

"1. No transient trader who occupies premises within the municipality of the city of Ottawa, and is not entered upon the assessment roll of the said city in respect of income or personal property for the then current year, shall offer goods or merchandize of any description for sale by auction, or in any other manner, conducted by himself or by a licensed auctioneer, or by his agent, or otherwise, within the limits of the said city of Ottawa, without or until he shall have first duly taken out a license for that purpose.

"2. There shall be levied and collected from the applicant for every such license for a transient trader the sum of $250.

. . . . . .

"5. The words 'transient traders,' wherever they occur in this by-law, shall extend to and include any person commencing the said business in the said city of Ottawa who has not resided

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continuously in the said city for a period of at least three months next preceding the time of the commencement of such business.

"6. Any person . . who shall be guilty of any . . breach of this by-law . . shall upon conviction thereof . . . forfeit and pay such fine as the police magistrate . . . convicting shall inflict, of not less than $1, and not more than $50, together with the costs of prosecution; and in default of payment thereof the same shall be collected by distress and sale of the goods and chattels of the offender; and in case of non-payment of the fine . . . and there being no distress . . such offender shall be imprisoned . . . with or without hard labour, for any time in the discretion of the police magistrate . . . convicting, not exceeding six months, unless such fine and costs be sooner paid."

(See sec. 583, sub-secs. 30 and 31, of the Municipal Act, R.S.O. 1897, ch. 223.)

The police magistrate convicted the defendant on the charge preferred, and sentenced him to pay a fine of $20 and $2 costs, both to be levied by distress, and in default one month in gaol at hard labour.

The conviction was in terms of the information and by-law.

The conviction was removed into the High Court by *certiorari* issued on the 1st April, 1902.

By 2 Edw. VII. ch. 12, sec. 14 (O.), sec. 7 of the Ontario Summary Convictions Act was amended by adding the following sub-section thereto:—

"(2) No such conviction or order as aforesaid shall be removed into the High Court of Justice by writ of certiorari except upon the ground that an appeal to the court of general sessions of the peace as herein provided would not afford an adequate remedy."

The Act containing this amendment was assented to on the 17th March, 1902.

A return to the *certiorari* having been made and filed, on the 10th April, 1902, before a Divisional Court (BOYD, C., FERGUSON and MEREDITH, JJ.), *E. E. A. DuVernet*, for the defendant, moved for a rule *nisi* to quash the conviction of the defendant, upon the following, amongst other, grounds:—

1. That the defendant was not upon the evidence a transient trader within the meaning of the Municipal Act.

2. That the defendant did not sell or offer for sale any goods or merchandize at the city of Ottawa.

3. That it is no offence for any one, within any municipality, whether resident within such municipality or not, to expose samples of cloth and solicit orders for clothing to be afterwards manufactured from similar cloth and delivered to persons giving such orders.

4. That there is no sufficient evidence of the fact of offering for sale.

5. That the conviction does not shew that the defendant carried or exposed goods to be afterwards sold or delivered in the city of Ottawa to any particular person.

6. That the statute upon which the by-law is founded is intended to affect only traders who occupy premises which are separate and distinct and in respect of which the trader might be assessed, and is not intended to affect the exposing of samples in a room of an hotel occupied under the circumstances appearing in evidence.

7. That the offence was not complete in the city of Ottawa, or in the Province of Ontario.

8. That the evidence does not disclose any offence.

9. That the conviction improperly awards imprisonment for non-payment of the costs. The by-law is invalid in providing for imprisonment for costs.

10. That the conviction cannot be amended so as to cause a variance from the minute.

The rule *nisi* was granted.

On the 14th May, 1902, before a Divisional Court (BOYD, C., and MEREDITH, C.J.C.P.), *Du Vernet* moved the rule absolute. The evidence does not disclose any offence against the transient traders' sub-sections of sec. 583. The goods were not sold nor offered for sale at Ottawa: *Rex* v. *McKnight* (1830), 10 B. & C. 734; *Regina* v. *Coutts* (1884), 5 O.R. 644; *Regina* v. *Applebe* (1899), 30 O.R. 623; *Regina* v. *Langley* (1899), 31 O.R. 295; *Regina* v. *Cuthbert* (1880), 45 U.C.R. 19; *Regina* v. *Caton* (1888), 16 O.R. 11. The by-law is bad, as it provides for imprisonment for non-payment of costs: *Regina*

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v. *McMillan*, 12th January, 1901, unreported decision of a Divisional Court (Falconbridge, C.J.K.B., and Street, J.); *Regina* v. *Hartley* (1890), 20 O.R. 481, 485. If the conviction is bad on this ground, it will not be amended unless the evidence warrants it.

A. B. Aylesworth, K.C., for the complainant. It is entirely a question of fact, and one proper for the decision of the magistrate, and the Court will not review his decision. The *certiorari* was issued on the 1st April, after the right to *certiorari* had been taken away by 2 Edw. VII. ch. 12, sec. 14, amending R.S.O. 1897, ch. 90, sec. 7. The *certiorari* was, therefore, improvidently issued, but it is not necessary to move to quash it. That it was improperly granted may be shewn as cause against the rule to quash: *Regina* v. *McAllan* (1880), 45 U.C.R. 402. But, if the conviction can be reviewed, the evidence shews an offence against the statute and by-law. There was an occupation of premises, if that is necessary: *Regina* v. *Roche* (1900), 32 O.R. 20. That is a question which could be threshed out on an appeal to the sessions. In *Regina* v. *Cuthbert*, 45 U.C.R. 19, occupation of premises was held to be necessary, but it is not necessary that they should be taxable premises. Here there was an exclusive occupation while it lasted. An offering for sale is all that is necessary under the statute, and that is abundantly shewn.

DuVernet, in reply. *Certiorari* is not taken away where the magistrate has no jurisdiction, and if the statute does not make what the defendant did an offence, the magistrate has no jurisdiction: *Regina* v. *Playter* (1901), 1 O.L.R. 360; Paley on Convictions, 7th ed., pp. 350, 351; *Hespeler* v. *Shaw* (1858), 16 U.C.R. 104, 105, 106; *Regina* v. *Toronto Public School Board* (1900), 31 O.R. 457; *Rex* v. *Dungey* (1901), 2 O.L.R. 223. What the defendant did is just what any commercial traveller does, and does not amount to a sale or an offering for sale: *Pletts* v. *Campbell*, [1895] 2 Q.B. 229.

May 15. BOYD, C.:—The Municipal Act, R.S.O. 1897, ch. 223, under Division XVIII.—Regulation of Trade—provides that by-laws may be passed for licensing hawkers or persons carrying on petty trades, or who go from place to place . . .

carrying goods . . . for sale: sec. 583 (14.) "*Hawkers*" shall include all persons who . . . sell or *offer for sale* tea, dry goods, etc., etc., or carry and *expose samples or patterns of any of such goods to be afterwards delivered*: *ib.*, sub-sec. (*a*).

For licensing transient traders who occupy premises for temporary periods . . . who may *offer* goods or merchandise *for sale* by auction, or in any other manner, conducted by themselves or by a licensed auctioneer or otherwise: sec. 583 (30, 31).

The words common to both classes of dealers are "offer goods for sale." As to pedlars, that has been held not to include the carrying of samples of goods and making sales of bulk goods to be delivered in accordance with the sample. To remedy this omission, amendments were made by the introduction of the words descriptive of what was meant by the term "hawker," so that it is to include those who carry or expose samples or patterns of goods to be delivered afterwards. It would require equivalent amending legislation, in my opinion, to bring the defendant under the category of "transient traders."

In the case in hand no goods are offered for sale; samples of goods are exhibited suitable for clothing, and the transaction is carried out by the choice of some particular pattern in Ottawa, notification of which is sent to Montreal, whereupon the garment is made, out of that material, and forwarded to the person giving the order at Ottawa, who then makes payment on delivery.

The collocation of the words in the statute as to sale or offering for sale by transient traders, implies some exhibition and visible presentation of the goods dealt in, such as occurs in sales by auction; the whole trading being carried on by the occupant of fixed premises within the municipality.

Neither in terms nor in substance was there, according to judicial exposition, an offering of goods for sale within the municipality. Nevertheless, the effect of this method of dealing may be to affect prejudicially the business of tax-paying tailors and clothiers of Ottawa.

According to the cases, *certiorari* lies if the magistrate has no jurisdiction over the matter adjudicated. That is, there was

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no power to pass a by-law or to convict under the transient traders' clauses in the Municipal Act in respect to a person living at an hotel and taking orders for clothing to be made out of material corresponding with samples exhibited.

The conviction is thus *ultra vires*, and should be quashed without costs.

Meredith, C.J.:—I agree; and on the second point I think we are bound by the authorities to hold that certiorari lies.

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[DIVISIONAL COURT.]

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Re Snure and Davis et ux.

Landlord and Tenant—Overholding Tenants Act—Summary Order for Possession—Review by High Court—Evidence—Breach of Covenant in Lease—Notice Specifying—Necessity for.

Under the Overholding Tenants Act, R.S.O. 1897, ch. 171, two things must concur to justify the summary interference of the county court Judge: the tenant must *wrongfully* refuse to go out of possession, and it must appear to the Judge that the case is *clearly* one coming under the purview of the Act.

It is only the proceedings and evidence before the Judge, sent up pursuant to the *certiorari*, at which the High Court may look for the purpose of determining what is to be decided under sec. 6 of the Act.

Where there was nothing in the evidence to shew that the tenants had violated the provision of the lease for breach of which the landlord claimed the right to re-enter, the Court set aside the order of the county court Judge commanding the sheriff to place the landlord in possession.

Per Boyd, C.:—The whole proceeding was nugatory from the outset for the want of a proper notice specifying the breach complained of, as required by sec. 13 of the Landlord and Tenant's Act, R.S.O. 1897, ch. 170, which is applicable to summary proceedings under the Overholding Tenants Act.

On the 10th February, 1902, an order was made by Lount, J., in Chambers, in the matter of certain proceedings under the Overholding Tenants Act pending in the county court of the county of Lincoln, between Jacob R. Snure, landlord, and Loyal Davis and Elizabeth Davis, tenants, requiring the Judge of the county court to send up the proceedings and papers in the matter, with all things touching the same.

Among the proceedings and papers returned were the following:—

An affidavit of Snure, the landlord, upon which the Judge of the county court had issued his appointment under sec. 3 of the Act, which affidavit stated that on the 4th May, 1901, the tenants leased from him 88½ acres, part of lot 3 in the 5th concession of the township of Clinton and part of lot 3 in the 4th concession; that default was made by the tenants in payment of the rent under the lease, and the goods and chattels of the tenants were seized under a certain mortgage held by one Charles A. F. Ball, and removed from the premises, and by reason of such default as aforesaid the tenants forfeited their rights to possession, and the term became forfeited and void; that a notice to quit was duly served on the tenants, but they refused to quit and deliver up possession of said lands and premises, and were wrongfully in possession.

The notice to quit referred to, which was served on the tenants on the 24th December, 1901, and which stated that the "lease and right of occupation have been determined and expired by breach of the covenant in said lease."

The county court Judge's notes of the evidence taken before him, which were in part as follows:—

"J. R. Snure, sworn, landlord. Lease put in marked "A," 4th May, 1901. First $100 due 1st Nov., not paid. I asked for it. Davis said would pay. That was about 2nd Nov. I saw him again after about a week. Saw him a third time. He said he would get it, but failed. He said afterwards that he could not get the money. . . . Ball seized some of the stock on chattel mortgage and sold goods seized. I demanded possession, and they refused to give possession. . . . Bailiff distrained under the lease. Condition in lease—rent due on certain proviso transpiring.

"R. R. Boyle, sworn, bailiff. I had warrant from Ball under chattel mortgage. Goods were on tenants' farm. Mortgage was by tenant's mother. I seized them on tenants' farm. . . . The chattels were used by tenant. 20th-22nd Nov. last.

"Loyal Davis, sworn, tenant. Snure gave us time and did not withdraw. Chattels belonged to my mother. I had no claim. Chattel mortgage was given to secure my note. I used the chattels.

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"David Davis, sworn. Chattel mortgage made by mother. Mother did not live on the place. The rent due has been paid. The tenant has not been served. (R.S.O. ch. 170, sec. 13). Cross-examined. When I say rent was paid, I mean it was made by sale, but the money was tendered before sale on the day of the sale.

"Loyal Davis, sworn, nephew of tenant. Present at sale. The money was tendered to Boyle, $100 for rent, and $10 for costs. Boyle went on and sold goods. Sale realized $151. Tender was under protest—19th Dec.—$100 was not tendered under protest; only the $10 was tendered under protest, because we did not know what the costs were.

"Jacob Fawell, sworn. I tendered the $110 to the bailiff. I laid the money on the table. He refused to take it, asking for $135.25. I told bailiff there was the rent and $10 for costs. I did not hear any protest for any part of the money."

The lease, dated 4th May, 1901, for five years from that date at $200 per year, payable half-yearly on the 1st November and May in each year, and containing a clause providing that the current and next ensuing half-year's rent should become due, and the term should become forfeited and void, if the lessees should make any chattel mortgage, etc.

The county court Judge's order, which adjudged that the landlord was entitled to possession, and ordered that a writ should issue to the sheriff commanding him to give the landlord possession.

The tenants thereupon gave notice of a motion to set aside the order of the county court Judge, and of reading thereon several affidavits, and depositions taken by way of cross-examination thereon.

The grounds of the motion were: (1) That the lease under which the tenants were in possession of the property in question had not expired or been determined at the time the proceedings were taken under the provisions of the Overholding Tenants Act. (2) That nothing was done by the tenants which entitled the landlord to declare a forfeiture of the lease in question, or to demand possession of the premises. (3) That, even if the landlord was entitled to declare a forfeiture, no

proper proceedings were taken by him entitling him to recover possession under the provisions of the Overholding Tenants Act. (4) That upon the proceedings before the county court Judge, it appeared that there was a *bonâ fide* matter of dispute between the parties, and the Judge should not have determined the matter summarily, but have dismissed the case and left the landlord to his remedy, if any, by an ordinary action at law. (5) That it did not appear in the proceedings before the Judge that the case was clearly one coming within the true intent and meaning of sec. 3 of the Overholding Tenants Act, and the Judge had, therefore, no jurisdiction to grant the order.

The following provisions of the Overholding Tenants Act, R.S.O. 1897, ch. 171, are applicable:—

(3).—(1) In case a tenant, after his lease or right of occupation . . . has expired, or been determined, either by the landlord or by the tenant, by a notice to quit or notice pursuant to a proviso in any lease or agreement in that behalf, or has been determined by any other act whereby a tenancy or right of occupancy may be determined or put an end to, wrongfully refuses, upon demand made in writing, to go out of possession of the land demised to him, or which he has been permitted to occupy, his landlord . . . may apply upon affidavit to the Judge of the county court of the county . . . in which the land lies . . . to make an inquiry as is hereinafter provided for.

(2) Such Judge shall in writing appoint a time and place at which he will inquire and determine whether the person complained of was tenant to the complainant for a term or period which has expired or has been determined by a notice to quit or for default in payment of rent or otherwise, and whether the tenant holds possession against the right of the landlord, and whether the tenant does wrongfully refuse to go out of possession, having no right to continue in possession, or how otherwise.

5. If, at the time and place appointed, as aforesaid, the tenant, having been duly notified, . . . fails to appear, the Judge, if it appears to him that the tenant wrongfully holds, may order a writ to issue to the sheriff . . . commanding him forthwith to place the landlord in possession of the premises in question; but if the tenant appears at such time and place,

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the Judge shall, in a summary manner, hear the parties, and examine into the matter, and shall administer an oath or affirmation to the witnesses called by either party, and shall examine them; and if after such hearing and examination it appears to the Judge that the case is clearly one coming under the true intent and meaning of section 3 of this Act, and that the tenant wrongfully holds against the right of the landlord, then he shall order the issue of such writ, as aforesaid, otherwise he shall dismiss the case; . . .

6. Where such writ has been issued, the High Court or a Judge thereof may on motion, within three months after the issue of the writ, command the Judge to send up the proceedings and evidence in the case to the Court, certified under his hand, and the Court may examine into the proceedings, and, if the Court finds cause, may set aside the same, and may, if necessary, order a writ to issue to the sheriff, commanding him to restore the tenant to his possession, in order that the question of right, if any appears, may be tried, as in ordinary actions for the recovery of land.

The motion to set aside the order was heard by a Divisional Court composed of BOYD, C., and MEREDITH, C.J.C.P., on the 16th May, 1902.

George Kerr, for the tenants. The questions which are raised here shew that the right to possession cannot be decided upon a summary application: *Re Magann and Bonner* (1896), 28 O.R. 37, 40. There was no breach of the provision in the lease; the mortgage was by the mother of the tenant Loyal Davis upon her own goods. If there was a breach, there should have been notice to the tenants: R.S.O. 1897, ch. 170, sec. 13, sub-sec. 1. The notice to quit would have been necessary in any case, and is not a notice of breach. The landlord by distraining for a year's rent recognized the tenancy, and could not eject.

Thomas Mulvey, for the landlord. The county court Judge decided that the goods mortgaged belonged to the tenants, and not to the mother; the mortgage was made for the benefit of the tenants. The landlord should be allowed to read the affidavits and depositions made and taken since the Judge's

decision, as evidence upon this motion; this is contemplated by sec. 6 of the Overholding Tenants Act. Such a forfeiture as this is enforceable without notice: *Argles* v. *McMath* (1895), 26 O.R. 224. The notice under the Overholding Tenants Act requiring possession is sufficient: R.S.O. 1897, ch. 170, sec. 13, sub-secs. 6, 7; *McMullen* v. *Vannatto* (1894), 24 O.R. 625. The Judge now has jurisdiction under the Overholding Tenants Act, even where there is a dispute as to the expiration of the tenancy: *Moore* v. *Gillies* (1897), 28 O.R. 358. The affidavit filed by the landlord on obtaining an appointment from the county court Judge is not legal evidence against the tenant: *In re O'Connell* (1865), 1 U.C.L.J. N.S. 163: and cannot be evidence at all.

Kerr, in reply, referred to sub-sec. 8 of sec. 13, and on the question of waiver to *Dobson* v. *Sootheran* (1887), 15 O.R. 15; *Cotesworth* v. *Spokes* (1861), 10 C.B.N.S. 103, 112.

May 19. BOYD, C.:—Under the Overholding Tenants Act two things must concur to justify the summary interference of the Judge: (1) the tenant must *wrongfully* refuse to go out of possession; and (2) it must appear to the Judge that the case is *clearly* one coming under the purview of the Act. These two adverbs seem to be used emphatically; and, on a consideration of the evidence and proceedings returned herein, I find that neither requirement is adequately met by the applicant, who is the landlord.

Before proceedings were begun as against an overholding tenant, the landlord had levied by distress, and been paid all the rent due by effluxion of time, but he claimed another gale by way of acceleration under the lease and by virtue of the alleged forfeiture of the term.

Notice served by landlord on 24th December, 1901, was a demand of possession, on the ground that the lease and right of occupation thereunder had been determined and ended by breach of the covenant in said lease.

No covenant is specified in the notice, but by the affidavit of the applicant it is said: "Default was made in payment of rent under the lease, and the goods and chattels of the tenants were seized under a mortgage held by one Ball, and removed from

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the premises, and by reason of such default the tenants have forfeited their rights to possession, and the term became forfeited and void."

The clause of the lease relied on is: "If lessees shall make any chattel mortgage of any of their crops or other goods or chattels or if such crops, etc., shall be at any time liable to seizure by any chattel mortgage thereof . . . so that there would not be left a sufficient distress for the rent due or accruing due . . . then the current as well as the next ensuing half year's rent, etc., shall immediately become due and payable, and the term shall at the option of the lessor immediately become forfeited and void."

This tenant could come under the Overholding Tenants Act only by the ending of his current term—through the alleged breach of covenant as to chattel mortgage, by which the term would be and become forfeited and void at the option of the lessor. This breach would work a forfeiture, and, by the Landlord and Tenant's Act, no right of re-entry or forfeiture under any stipulation in a lease for breach of any such covenant as this shall be enforceable, by action or otherwise, unless and until a notice is served specifying the particular breach complained of, etc.: R.S.O. 1897, ch. 170, sec. 13.

I see no reason why this should not apply to summary proceedings under the Overholding Tenants Act, as well as to the more deliberate course of procedure by action. It would seem to be of equal importance in either case, where a right of forfeiture exists and is remediable. The term "enforceable" indicates that some compulsory power is to be invoked, and such power is vested in the Court or a Judge thereof.

This breach, if it existed, was matter of compensation, as it was no more than the removal of some goods whereby a sufficient distress might not remain to answer the rent.

But in fact there was no breach. The evidence is uncontradicted that the goods seized and sold under the prior chattel mortgage held by Ball were not the goods of the lessees, but of Mrs. Davis, mother of the male tenant. No question can arise in the proceeding as to the attitude of creditors with regard to these goods, for they were validly sold under the chattel mortgage, and as between the mother and the tenants they were

unquestionably the goods of the former and not of the tenants.

In my opinion, the whole proceeding was nugatory from the outset for the want of a proper notice specifying the breach complained of, and having overcome that, the further substantial obstacle arises that no such breach as is relied on has in point of fact happened.

The proceedings should be set aside and possession restored to the tenants with costs.

MEREDITH, C.J.:—It is only the proceedings and evidence before the Judge, sent up pursuant to the writ of *certiorari*, at which we may look for the purpose of determining what is to be decided by the Court under sec. 6 of the Overholding Tenants Act, R.S.O. 1897, ch. 171.

There is nothing in the evidence to shew that the tenant Loyal Davis had violated the provision of the lease for breach of which the landlord claimed the right to re-enter. The chattel mortgage, the making of which the landlord relied on as having been a breach of that provision, was not made by Davis, but by his mother, who was a stranger to the lease, and the goods embraced it it were her goods, and not Davis's.

There was, therefore, but one gale of rent due—that which was payable according to the terms of the lease on the 1st November, 1901—and that having been satisfied by the distress which was made, the landlord had no right to put an end to the lease and to re-enter.

It is unnecessary to consider the other questions raised by the tenants' counsel—some of which at least appear to be of a formidable character.

The order must, therefore, be set aside, and, if necessary, an order be made for a writ to the sheriff commanding him to restore the tenants to their possession, and the landlord must pay the costs here and below.

E. B. B.

[IN CHAMBERS.]

1902

May 27.

PEOPLE'S BUILDING AND LOAN ASSOCIATION v. STANLEY.

Appeal—Leave—Order Striking out Jury Notice—Powers of Judge in Chambers —Conflicting Decisions.

In an action of covenant upon two mortgages, the defence was that the defendant had been induced to execute them by false and fraudulent representations. The defendant filed and served a jury notice, which was struck out by a Judge in Chambers, whose order was affirmed by a Divisional Court. A motion by the defendant for leave to appeal to the Court of Appeal was refused:—

Held, that the order sought to be appealed against involved no question of law or practice on which there had been conflicting decisions or opinions by the High Court, or by Judges thereof: R.S.O. 1897, ch. 51, sec. 77, sub-sec. (4), cl. (*c*).

The power of a Judge in Chambers to strike out a jury notice has never been doubted.

MOTION by the defendant for leave to appeal to the Court of Appeal from an order of a Divisional Court affirming an order of a Judge in Chambers striking out a jury notice filed by the defendant. The facts appear in the judgment.

The motion was heard by MACLENNAN, J.A., in Chambers, on the 26th May, 1902.

W. H. Bartram, for the defendant.

D. W. Saunders, for the plaintiffs.

May 27. MACLENNAN, J.A.:—Action of covenant upon two building society mortgages, made by the defendant to the plaintiffs in the year 1895, for securing two several loans of $1,000 each. Defence that the defendant was induced to execute the mortgages without reading them, or understanding their true effect, by false and fraudulent representations by the plaintiffs' manager that the loans would only cost him three per cent. or less, and also by false explanations of the effect of the mortgages, made to him by the same manager; and that, under the belief induced by such false and fraudulent representations, he made monthly payments to the plaintiffs until the month of July, 1900, when he ceased to make further payments.

On the 10th May instant an order was made by Mr. Justice Lount striking out the defendant's jury notice, and upon appeal

to a Divisional Court that order was affirmed on the 16th May.

The ground of the present application expressed in the notice of motion, and argued by Mr. Bartram, is that the decision involves questions of law and practice upon the construction of sec. 110 of the Judicature Act,* on which there have been conflicting decisions or opinions by the High Court of Justice and by the Judges thereof. This ground is the only one upon which, under sec. 77 of the Judicature Act, it was open to him to rest his motion, for the case clearly does not fall within any of the clauses of sub-sec. (4), unless it falls within cl. (*c*).†

Mr. Bartram cited the following cases: *Bristol, &c., Co.* v. *Taylor* (1893), 15 P.R. 310; *Hawke* v. *O'Neill* (1898), 18 P.R. 164; *Bank of Toronto* v. *Keystone Fire Ins. Co.* (1898), *ib.* 113; and *Sawyer* v. *Robertson* (1900), 19 P.R. 172.

I have examined these cases and also those cited by Mr. Saunders: *Lauder* v. *Didmon* (1894), 16 P.R. 74; *Regina* v. *Grant* (1896), 17 P.R. 165; *Toogood* v. *Hindmarsh* (1897), *ib.* 446; *Skae* v. *Moss* (1896), 18 P.R. 119*n*.

The only conflict of decisions which I find in these cases is between *Bank of Toronto* v. *Keystone Fire Ins. Co.*, decided by a Divisional Court on 4th May, 1898, and the earlier case of *Skae* v. *Moss*, decided by a Divisional Court in February, 1896, the latter case not having then been reported and not having been cited in the subsequent case. The point decided in those cases, however, has no bearing upon the present, that point having been whether a Judge at the trial has power to strike out a jury notice, and to transfer the action for trial at the non-jury sittings.

The power of a Judge in Chambers under sec. 110 to strike out a jury notice has never been doubted in any case, although

* R.S.O. 1897, ch. 51, sec. 110: Notwithstanding anything in sections 106 and 107 contained, the Judge presiding at the trial may in his discretion direct that the action . . shall be tried . . by a jury; and upon application to the Court in which the action is pending, or to a Judge thereof, by an order made before the trial, or by the direction of the Judge presiding at the trial, the issues may be tried and damages assessed without a jury.

† (*c*) Where the judgment or order involves a question of law or practice on which there have been conflicting decisions or opinions by the High Court of Justice, or by Judges thereof.

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Street, J., in one case * expressed the opinion that in general it ought not to be done. But that opinion does not appear to me to be a conflict of decisions or opinions within sub-sec. (*c*) of sec. 77 (4) of the Act.

The motion will be refused with costs.

* *Bristol, etc., Co.* v. *Taylor*, 15 P.R. 310.

T. T. R.

[IN THE COURT OF APPEAL.]

C. A.

1902

May 16.
May 30.

CENTAUR CYCLE CO. v. HILL ET AL.

Appeal—Court of Appeal—Order of Judge Removing Stay of Execution—Rule 827—Discretion—Grounds for Removal.

An appeal lies to the Court of Appeal from an order of a Judge thereof, in Chambers, under Rule 827, directing that the execution of the judgment appealed from shall not be stayed pending the appeal.

Such an order is not a purely discretionary one; a proper case must be made out for allowing the respondent to enforce what has not yet become a final judgment, the appeal being a step in the cause.

A Judge in Chambers having ordered the removal of the stay upon the ground that the appellants' financial position was weak, his order was reversed by the Court, where the appeal appeared to be prosecuted in good faith and on substantial grounds, and the effect of the execution would practically be to close up the business of one of the appellants.

THE defendants had appealed to the Court of Appeal from a judgment of the High Court in favour of the plaintiffs for $2,500, or thereabouts, for goods sold and delivered, and $200 had been paid into Court by the defendant Love as security for the costs of the appeal.

The plaintiffs, the respondents upon the appeal, moved for an order for leave to issue execution on their judgment notwithstanding the pendency of the appeal.

Rule 827 (1) provides that "unless otherwise ordered by the Court appealed to or a Judge thereof, the execution of the judgment or order appealed from shall . . . in the case of an appeal to the Court of Appeal, upon the security in Rule 826 mentioned being allowed, be stayed pending the . . appeal," except in certain specified cases not necessary to be mentioned here.

By Rule 827 (2): "Upon special application, the Court appealed to or a Judge thereof may order that execution shall not be stayed, in whole or in part, except upon such terms as may seem just, including the giving of security for any sum directed by the judgment or order appealed from to be paid, ..."

The motion was heard by MACLENNAN, J.A., in Chambers, on the 15th May, 1902.

W. E. Middleton, for the plaintiffs.

C. W. Kerr, for the defendant Hill.

W. E. Raney, for the defendant Love.

May 16. MACLENNAN, J.A.:—After some hesitation, and with some reluctance, I have come to the conclusion that the plaintiffs are entitled to what they ask. They have a judgment for $2,500 for goods—of which the defendants have received the benefit. They were dealing with the defendants on terms of security for their account, and the security has turned out to be wholly illusory. The financial position of the defendants is now found to be weak, one of them having given up business for that reason, and the other having been obliged to borrow two considerable sums upon mortgage of his stock in trade to enable him to carry on his business. I think, under these circumstances, the case is one for the exercise of the power given by Rule 827 (2) of ordering that execution be not stayed pending the appeal.

The appellants may, however, have the execution stayed upon giving security to the satisfaction of a Judge for the judgment debt and costs.

Costs of this motion to be costs in the appeal.

The defendant Love appealed from the order of Maclennan, J.A., to the Court of Appeal, and his appeal was heard by OSLER, MACLENNAN, MOSS, and GARROW, JJ.A., on the 19th and 20th May, 1902.

Raney, for the defendant Love.

Kerr, for the defendant Hill, supported the appeal.

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Middleton, for the plaintiffs, opposed the appeal, and objected also that an appeal did not lie from an order of a Judge under Rule 827 (2). He contended that the power given to remove the stay of execution was a special statutory jurisdiction given to either one of two tribunals by the words "the Court appealed to or a Judge thereof," and no appeal being expressly given by the Rule from one tribunal to the other, no appeal lay. This case was distinguishable from *Platt* v. *Grand Trunk R. W. Co.* (1887-8), 12 P.R. 380, because there the jurisdiction exercised by the Judge in Chambers was the jurisdiction of the Court, exercised by him as the delegate of the Court, he not being named in the statute there in question or in any sense *persona designata*. The question here was governed by *Neill* v. *Travellers' Ins. Co.* (1883), 9 A.R. 54—a case practically on all fours with this.

May 30. The judgment of the Court was delivered by OSLER, J.A.:—First, as to the competency of the appeal. The order of my learned brother is one made in relation to a pending appeal—a matter in Court—and in that respect is not like an order made in a matter external to its ordinary jurisdiction in pursuance of some authority conferred by a statute upon the Court or a Judge of the Court *pro hâc vice*, *e.g.*, under the Dominion Railway Act: *Re Toronto, Hamilton, and Buffalo R.W. Co. and Hendrie* (1896), 17 P.R. 199; or the Winding-up Act: *Re Sarnia Oil Co.* (1893), 15 P.R. 347; *Re Central Bank of Canada* (1897), 17 P.R. 370, 395. In the latter case it may well be that when a Judge makes an order he does so as *persona designata*—as one of the two jurisdictions upon whom an alternative authority is conferred to do the act. Here the order is made in the cause to remove the stay of execution under the authority of the Rule of Court 827 (1), "unless otherwise ordered by the Court appealed to or a Judge thereof," etc. I see no tangible distinction between these words, as here used, and the words "the Court or a Judge," and the meaning of the latter, when used in a statute or Rule of Court in relation to jurisdiction over proceedings in a cause or matter, is well recognized; "the Court" means a Judge or Judges in open Court; "a Judge" means a Judge sitting in Chambers:

In re B., an Alleged Lunatic, [1892] 1 Ch. 459, 463: or, as Brett, J.A., said in *Baker* v. *Oakes* (1877), 2 Q.B.D. 171, 175, using the old terminology: "'A Court or a Judge' means the Court sitting in banc or a Judge at Chambers representing the Court in banc." See also *per* the same Judge in *Dallow* v. *Garrold* (1884), 54 L.J.Q.B. 76, 78:—"The statute gives the power to the 'Court or Judge,' and it is well recognized that that phrase always includes a Judge at Chambers, unless there is some express enactment limiting the meaning of the phrase." And see *In re Housing of the Working Classes Act, 1890, Ex p. Stevenson*, [1892] 1 Q.B. 394. From the order of a Judge thus sitting in Chambers, unless it is one made purely in the exercise of his discretion (*Kennedy* v. *Braithwaite* (1883), 1 Ont. Elec. Cas. 195 *n.*, *Neill* v. *Travellers' Ins. Co.*, 9 A.R. 54) an appeal, in my opinion, lies to the full Court: Arch. Prac., 14th ed., vol. 2, p. 1418; *Jackson* v. *Randall* (1874), 24 C.P. 87; *Kilkenny, etc., R.W. Co.* v. *Feilden* (1851), 6 Exch. 81, 83 note (*a*).

Then, secondly, I do not think that the order in question is a purely discretionary order. The general rule and the right of the appellant is that, save in the excepted cases, proceedings below are stayed upon the appeal being perfected. Nevertheless, if "the Court or a Judge thereof" otherwise orders, the stay of execution may be removed. A proper case must be made out for allowing the respondent to enforce what has not yet become a final judgment, the appeal being a step in the cause. Upon the whole, after having given the matter a good deal of consideration, we are all of opinion that, under the circumstances, an order for leave to issue execution ought not to go. The appeal appears to be prosecuted in good faith and on substantial grounds. The defendant is carrying on his business in the usual way, and the effect of an execution will practically be to close it up, and possibly to place the defendant in a situation from which he will find it difficult, if not impossible, to recover, if his appeal should be successful.

The plaintiffs do not make a *primâ facie* case against the *bona fides* of the instruments which they propose to attack. They desire to proceed by way of seizure and interpleader, but they can proceed quite as effectively by way of action; and,

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Osler, J.A.

while the rights of the parties are in suspense, the method likely to be least injurious to the defendant ought to be followed. Apart from the property which it is desired to reach by impeaching the chattel mortgages, there seems to be nothing to be secured or laid hold of by the execution, and, therefore, as to neither of the defendants does it appear that there is any special advantage to be gained in the nature of security, etc., by removing the stay. The order will, therefore, be discharged, and the costs of appeal, and of the motion it deals with, will be costs in the appeal.

T. T. R.

[DIVISIONAL COURT.]

D. C.
1902
April 17.

McCLURE
v.
THE CORPORATION OF THE TOWNSHIP OF BROOKE.

BRYCE
v.
THE SAME.

Drainage Referee—Official Referee—Drains—Damages—Reference.

An official referee is only official in the sense of being an officer of the Court.
The drainage referee being an officer of the Court with all the necessary powers, is an official referee for the purposes and within the meaning of the Arbitration Act, and an action for damages in connection with the construction of drains may be referred to him.
Judgment of Meredith, C.J.C.P., reversed.

THESE were appeals from the judgments of Meredith, C.J.C.P., in the above two actions, which were argued together as the point in question was the same in both.

J. Grayson Smith, for the motions.
J. H. Moss, contra.

The following statement of facts is taken from the judgment of BRITTON, J., in the Divisional Court.

The actions were brought to recover damages for flooding the plaintiffs' lands, such damages being, as the plaintiffs contended, outside of and additional to those recoverable by proceedings under 1 Edw. VII. ch. 30, sec. 4 (O.) amending R.S.O. 1897, ch. 226.

The plaintiffs are also proceeding under that Act for such other damages, which, if recoverable, can be recovered only by trial before the drainage referee; and for convenience and to save expense, the plaintiffs desire to have their respective actions referred, so that the whole matter may be disposed of by that officer.

Motions to refer were heard by Chief Justice Meredith in Chambers on January 20th, 1902, and he dismissed both applications, on the ground that the Drainage Referee is not an

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official referee within the meaning of the Arbitration Act, by the following judgment.

MEREDITH, C.J. (at the close of the argument):—If I were able to come to the conclusion that the drainage referee is an official referee within the meaning of sec. 29 of the Arbitration Act, R.S.O. 1897, ch. 62, I think the proper course would be to refer to him as an official referee all the matters of which the plaintiffs complain which are not within the provisions of sec. 4 of the Act of 1901, 1 Edw. VII. ch. 30, but I think it is clear that the drainage referee is not an official referee; he is a special officer appointed for the purposes of the drainage works and matters arising out of them, and the provisions of the sections which make reference to the powers of an official referee are, I think, only for the purpose of giving to him as to those matters the powers which, under the various Acts that are referred to, an official referee may exercise.

That is quite a different thing from making him an official referee.

It would follow, if he were an official referee, that a reference *in any case* might be made to him. I think that would be contrary to the spirit and intent of the legislation. This officer was set apart for this special kind of work. I think, therefore, that I have no jurisdiction to make the order which is asked.

I think, however, that it is in furtherance of justice and the interest of the parties, that the proceedings in these actions should not go on until the references before the drainage referee are concluded. The result of those references will be to determine whether or not there are matters outside of the scope of sec. 4. If there are, the plaintiffs should then have the right to go on to try their actions as to them. If there is none, then these actions can be disposed of.

I propose, therefore, if the plaintiffs desire it, to make orders staying the proceedings in these two actions pending the references under the Drainage Act, with liberty to either party to apply. The costs of these applications will be in the cause to the successful parties.

From this judgment the plaintiffs appealed, and the appeal was argued on February 10th, 1902, before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., and BRITTON, J.

G. H. Watson, K.C., for the appeal. The plaintiffs are entitled to damages for acts of misfeasance. The drainage referee has exclusive jurisdiction in all matters within the meaning of the Act. He is an official referee, an officer of the High Court, and his term of office is the same as that of an official referee: R.S.O. 1897, ch. 226, sec. 88, sub-secs. 2 and 4. He has all the powers of an official referee: sec. 89. He may report on references to him under secs. 28 and 29 of the Arbitration Act, R.S.O. 1897, ch. 62, where the reference would only be made to an official referee: sec. 110. The official referees named in sec. 141 of the Judicature Act may be added to: sub-sec. 2; and the drainage referee was subsequently appointed.

J. H. Moss, contra. These actions are not limited to attacking the drains on the plaintiffs' properties, but attack the whole system of drainage. The object of the amending Act was to remove all drainage matters from the High Court to the drainage referee. The Legislature provided for such reference by sec. 94 of the original Act, but has now repealed it. If this action can be referred to the drainage referee any action could, and he would be an official referee for all purposes. If he is an official referee why confer powers on him and settle the terms of his office as the same as that of an official referee? Section 141 of the Judicature Act names official referees and does not include the drainage referee.

Watson, in reply.

April 17. BRITTON, J.:—Before the passing of ch. 30, 1 Edw. VII. (1901), there would have been no difficulty, as sec. 94, ch. 226 R.S.O. 1897, gave the Court or a Judge power, on the application of either party or otherwise, and at any stage of the action, to make an order transferring or referring such action to the referee, but sec. 94 is repealed.

And now, if a claim is made for damages resulting from anything coming within sec. 4 of the amending Act of 1901, such claim can be heard and tried by the drainage referee only,

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and if the claim is wholly or in part for damages outside of what is provided for by sec. 4, there is no power to refer it to the referee, unless it can be done under the Arbitration Act, R.S.O. 1897, ch. 62, secs. 28 and 29.

The power under the Arbitration Act is to refer the case to (1) a Judge of a county court; or (2) to an official referee; or, *if the parties agree*, (3) to a special referee. Unless the parties agree, there can be no reference to the drainage referee, unless he is an official referee.

I have come to the conclusion, although with great hesitancy and with the greatest respect for the opinion of the learned Chief Justice, that the drainage referee is an official referee within the meaning of the Arbitration Act, to whom such an action as this may be referred.

There is no statutory definition of official referee, but sec. 141 of the Judicature Act names persons by their office who are official referees, and the drainage referee is not there named.

The Drainage Act, R.S.O. 1897, ch. 226, secs. 88 and 89, makes the drainage referee (1) an officer of the High Court; and (2) confers upon him all the powers of an official referee under the Judicature Act and Arbitration Act.

I think an official referee is only official in the sense of being an officer of the Court.

The drainage referee being an officer of the Court, with all necessary powers, is an official referee for the purposes and within the meaning of the Arbitration Act.

Con. Rule 12 provides that all the officers of the Court shall be auxiliary to one another for the purpose of promoting the convenient and speedy administration of business.

The Interpretation Act, sec. 8, sub-sec. 22, is as follows:—"Wherever power is given to any person, officer or functionary to do or to enforce the doing of any act or thing, all such powers shall be understood to be also given as are necessary to enable such person, officer, or functionary to do or enforce the doing of such act or thing."

For above reasons, and the drainage referee being specially qualified by sec. 89 of the Drainage Act with the powers of

referee under the Arbitration Act, I think the appeal should be allowed, and that this case should be referred to him.

Costs of appeal to be costs in the cause to the plaintiff in any event.

FALCONBRIDGE, C.J. :—I agree. The answer to the argument *ab inconvenienti* is that the Court can always exercise its discretion as to what kinds of cases ought to be referred to this class of official referee.

G. A. B.

[IN CHAMBERS.]

1902
April 28.

McCLURE
v.
THE CORPORATION OF THE TOWNSHIP OF BROOKE.

BRYCE
v.
THE SAME.

Appeal—Leave—Status of Judicial Officer.

Leave granted to appeal from the judgment of a Divisional Court, differing from that of a Judge in Chambers, and involving the status, jurisdiction, and authority of the drainage referee.

MOTION by the defendants for leave to appeal to the Court of Appeal from the judgment of the Divisional Court, reported *ante* p. 97.

The motion was heard before OSLER, J.A., in Chambers, on the 26th of April, 1902.

J. H. Moss, for the motion.
Watson, K.C., contra.

April 28. OSLER, J.A.:—There is a plain and weighty reason for giving leave to appeal in this matter, viz., that the judgment in question involves the status, jurisdiction, and authority of a judicial officer, and the validity of proceedings which may be taken by him hereafter under the order of the Divisional Court.

Plausible reasons have been suggested—it is not now necessary to pass upon them further—against the view which has been taken by the Divisional Court. It is enough to say that these, and the subject dealt with by the judgment, justify granting leave to appeal on the usual terms.

G. A. B.

[DIVISIONAL COURT.]

DUNN v. PRESCOTT ELEVATOR COMPANY, LIMITED.

1902
June 2.

Bailment—Warehousemen—Grain Elevator—Negligence—Fermentation.

The defendants, the keepers of an elevator, stored corn belonging to the plaintiffs in their bins. About a month afterwards, in removing the corn out of one of the bins, they discovered that it had become heated, of which they notified the plaintiffs, but made no examination of the rest of the corn, nor did the plaintiffs ask them to do so. When, shortly after, the corn was run out to be shipped, a quantity of it was found in an advanced state of fermentation :—

Held, that the defendants had been guilty of negligence and were liable to the plaintiffs for the loss sustained by them.

THIS was an appeal by the liquidator of the defendants from the judgment of MacMahon, J., in favour of the plaintiffs, in an action tried before him at Ottawa, on January 7th, 1902, without a jury.

The appeal was argued on April 16th and 17th, 1902, before STREET and BRITTON, JJ.

G. Henderson, for the defendants, referred to *Tobin* v. *Murison* (1845), 5 Moo. P.C. 110, 128 ; Beven on Negligence, 2nd ed., vol. 2, p. 998, citing *Cailiff* v. *Danvers* (1792), 1 Peake N.P. 155.

J. Leitch, K.C., for the plaintiffs.

The facts are stated in the judgment.

June 2. The judgment of the Court was delivered by STREET, J. :—The sole question to be determined in this case is as to the degree of care and watchfulness which the law requires the keepers of an elevator to exercise with regard to corn stored with them.

On April 24th, 1897, the plaintiffs, who were owners of 112,300 bushels of corn, stored it in the defendants' elevator at Prescott, and the defendants received the corn to hold for the plaintiffs and stored it in several large bins in their elevator.

I think the duties of the defendants, under the circumstances, are concisely and properly stated in the judgment in *Beal* v. *South Devon Railway* (1864), 3 H. & C. 337, at p. 342, as follows : "From a bailee for hire is reasonably expected care

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and diligence, such as are exercised in the ordinary and proper course of similar business, and such skill as he ought to have, namely, the skill usual and requisite in the business for which he receives payment." This is another form of stating the rule laid down in Story on Bailments, 9th ed., par. 444, that warehousemen are bound to take ordinary and reasonable care of the commodity entrusted to their charge, and, in par. 408, that if a loss occur which is not strictly inevitable, but there has been no omission of reasonable diligence on the part of the warehouseman, he is not liable.

In *Brabant & Co.* v. *King*, [1895] A.C. 632, at p 640, the Court describe thus the liability of certain parties to the action who held goods in store as bailees for hire: "They were therefore under a legal obligation to exercise the same degree of care towards the preservation of the goods entrusted to them from injury which might reasonably be expected from a skilled storekeeper acquainted with the risks to be apprehended either from the character of the storehouse itself or of its locality; and that obligation included, not only the duty of taking all reasonable precautions to obviate these risks, but the duty of taking all proper measures for the protection of the goods when such risks were imminent or had actually occurred."

And in *Snodgrass* v. *Ritchie & Lamberton* (1890), 17 Rettie 712, this duty was held to include the duty of reasonable inspection so as to see that the goods stored are not sustaining damage. Finally, in the *Mersey Docks Trustees* v. *Gibbs* (1864), L.R. 1 H.L. 93, the principle is affirmed that if knowledge of the existence of a cause of mischief makes persons responsible for the injury it occasions, they will be equally responsible when by their culpable negligence its existence is not known to them.

In the present case the corn having been put into the defendants' bins on April 24th, 1897, remained in them without examination and without being moved until the 3rd or 4th of June, 1897, excepting the corn in two of the bins, numbered 49 and 47. On May 22nd, 1897, the defendants being desirous of using bin 49 for another purpose removed the corn from it into another bin, and in the course of the removal it was discovered that it had become heated. They took the usual course

to stay the process of heating by exposing it to the air and the corn recovered. The other corn moved was that in bin 47, which replaced that in bin 49. All the corn so moved, that is, the corn originally in bins 47 and 49 suffered no injury; all the rest of the corn suffered damage. The plaintiffs contend that it was the duty of the defendants under the circumstances, upon finding part of the corn injured, to have examined the remainder carefully to ascertain whether it was becoming heated in order that proper steps might be taken without delay to prevent further injury. The defendants deny any such duty, and they point to the fact that when they notified the plaintiffs by telegram of the discovery of the heating in bin 49 the plaintiffs did not ask them to examine the condition of the other bins.

The evidence, I think, shews that there is a tendency in corn which is not absolutely dry to develop the process called heating when kept in a bin for any length of time, especially in the spring of the year; and even though the corn be dry when put in the bin it may afterwards absorb moisture sufficient to give rise to the process of heating. The defendants, as elevator men, were bound to know this. Their attention was pointedly called to this tendency by the discovery on May 22nd of the fact that heating had in fact begun in bin 49. This should have warned them that there was danger to the corn in the other bins, but they did nothing. They say that their men had general instructions to superintend and examine the condition of all the grain in their elevator, but no special instructions were given them after the discovery made on May 22nd. The evidence is that the existence of heating in a bin is readily discoverable even in its early stages by the clammy and dull condition of the corn throughout the bin and by the smell which comes from it; and a simple method exists by which a further examination can be made of the condition of the corn in the interior of the bin practically without expense. It does not appear, however, that the slightest examination was made of the condition of the corn, and I think it is plain from the advanced condition of the fermentation in some of it when it was run out to be shipped on the 3rd and 4th of June that a very slight examination would have revealed its early stages long before that date. In my opinion the defendants were guilty of

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negligence in not having more carefully watched and examined the condition of the corn under the circumstances and that they are liable to the plaintiffs for the loss which has happened.

In my opinion these damages have been properly estimated, and the appeal should, therefore, be dismissed with costs to be paid to the plaintiffs by the liquidator of the defendants' company, who is the appellant.

A. H. F. L.

[DIVISIONAL COURT.]

D. C.
1902
May 5.

THE CANADIAN BANK OF COMMERCE v. MARY ROLSTON.

Execution—Sale Under Fieri Facias—Unassigned Dower in Equity of Redemption—Share in Equity of Redemption—R.S.O. 1897 ch. 77, secs. 29, 30, 33—Con. Rules 1016, 1017, 1018.

A right of dower in an equity of redemption before assignment is not exigible under a writ of *fieri facias*; nor is the share of one of several tenants in common of an equity of redemption.

Where a person dies possessed of lands mortgaged by him, his widow, before assignment of dower, though entitled to redeem, has no estate in the land, and is therefore not an "assign" of her husband, nor a "person having the equity of redemption" within sec. 29 of the Execution Act, R.S.O. 1897, ch. 77, and her interest does not come within sec. 30 of that Act, and therefore is not saleable under it, nor under sec. 33.

In such a case an execution creditor seeking equitable execution should proceed under Con. Rules 1016, 1017 and 1018, and not by action.

THIS was an appeal to the Divisional Court by the plaintiffs from a judgment of Lount, J., dismissing the action with costs at the hearing before him of a motion by the plaintiffs for judgment upon the pleadings and examination of the defendant.

The plaintiffs are execution creditors of the defendant under judgments in two actions in the division court: the defendant is the widow of one Charles Rolston who died intestate in the year 1899, owner in fee of lot 18, 2nd concession, S. D. R., Brant, subject to a mortgage thereon to one David Smith, which is still unpaid. The defendant, upon her husband's death, became entitled at her election either to dower in the equity of redemption, or under the Devolution of Estates Act,

to an undivided one-third share in the said lands, subject to the said mortgage. The deceased left two children, his heirs at law, surviving him. The plaintiffs have two division court executions against lands in the sheriff's hands, and bring the present action alleging that the interest of the defendant in the said lands is not such an interest as the sheriff can seize and sell under execution, and they ask that their executions may be aided by the judgment of this Court.

The facts were admitted by the defendant upon her examination for discovery.

The learned Judge thought the plaintiffs could sell the lands under their executions in the division court, and dismissed the action with costs.

The plaintiffs appealed to the Divisional Court, and their appeal was argued on December 12th, 1901, before FALCONBRIDGE, C J.K.B., and STREET, J.

H. J. Scott, K.C., for the plaintiffs, contended that the widow's interest was not saleable under a writ of *fieri facias*: *Heward* v. *Wolfenden* (1868), 14 Gr. 188; *VanNorman* v. *McCarty* (1869), 20 C.P. 42; *Wood* v. *Wood* (1869), 16 Gr. 471; *Cronn* v. *Chamberlin* (1880), 27 Gr. 551; *Allen* v. *Edinburgh Life Ass. Co.* (1877), 25 Gr. 306; *Douglas* v. *Hutchison* (1885), 12 A.R. 110; *Ward* v. *Archer* (1894), 24 O.R. 650.

M. H. Ludwig, for the defendant, contended that the defendant had an interest in land, with power to dispose, and therefore her interest was saleable under writ of *fieri facias*: *Re Luckhardt* (1897), 29 O.R. 111; *Pratt* v. *Bunnell* (1891), 21 O.R. 1; Armour on Titles, 2nd ed., p. 122; R.S.O. 1897, ch. 164, sec. 7, sub-secs. 1 and 2.

Scott, in reply, referred to *Samis* v. *Ireland* (1879), 4 A.R. 118; *Gemmill* v. *Nelligan* (1895), 26 O.R. 307.

May 5. The judgment of the Court was delivered by STREET, J. [after stating the facts of the case as above]:—The plaintiffs' judgments and executions are in the division court, and there seems to be no machinery in those courts for selling the interest of a judgment debtor in any lands, except the interest be saleable by the sheriff under an ordinary *fieri facias*

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lands. If the plaintiffs are right in their view that the interest of the defendant which they seek to realize is one not saleable by the sheriff under their *fieri facias*, then they are obliged to take other proceedings for the purpose of enforcing the charge created by their delivery to the sheriff.

Charles Rolston, the defendant's husband, died intestate in 1899, leaving the defendant and two children surviving, and being owner in fee simple of the equity of redemption in a farm, subject to a mortgage. The defendant, the widow, upon his death had her election, which has not yet been exercised, between taking her dower in the equity of redemption, or taking an undivided one-third of the land absolutely, subject of course to the mortgage, as tenant in common with her children, the heirs at law.

The plaintiffs contend that in whichever way the widow elects, her interest is not saleable by the sheriff under a *fieri facias*, and, with great respect for the judgment appealed from, I am of opinion that the plaintiffs' contention is right for the following reasons:—

If the widow is assumed to elect in favour of the undivided third share of the equity of redemption, as she is permitted to do by the Devolution of Estates Act, then she becomes tenant in common of the equity of redemption with her children, and it is settled that the interest of one of several shares in an equity of redemption cannot be sold by the sheriff under a *fieri facias*: *Heward* v. *Wolfenden*, 14 Gr. 188; *Cronn* v. *Chamberlin*, 27 Gr. 551; *Samis* v. *Ireland*, 4 A.R. 118.

If, on the other hand, the widow is assumed to elect to retain her dower, then there seems no authority under the statutes in the sheriff to sell a widow's dower in an equity of redemption.

Prior to the passing of the section now represented by R.S.O. 1897, ch. 77, sec. 33,* it had been held that the right of a

*R.S.O. 1897, ch. 77, sec. 29. Wherever the word "mortgagor" occurs in the next succeeding three sections, it shall be read and construed as if the words "his heirs, executors, administrators or assigns or person having the equity of redemption" were inserted immediately after the word "mortgagor."

30. (1) The sheriff or other officer to whom a writ of execution against the lands and tenements of a mortgagor of real estate is directed, may seize, sell

widow to dower which had not been set apart and ascertained, was not saleable under *fieri facias* by the sheriff, but that the section in question included such a right: *Allen* v. *Edinburgh Life Ass. Co.*, 25 Gr. 306. But sec. 33 is to be read in connection with secs. 29 to 32, under which equities of redemption are dealt with; and an interest in an equity of redemption, which comes within sec. 30 as well as within sec. 33, may, under the combined effect of those sections, be sold by the sheriff under *fieri facias*, unless such a sale would offend against the limitations imposed upon such sales by the principles laid down in *Heward* v. *Wolfenden*, *Cronn* v. *Chamberlin*, and that class of cases. But a widow having a right to dower which has not been assigned, although she is entitled to redeem a mortgage to which her dower is subject, is not possessed of an estate in the land, and is not therefore an "assign" of her husband, nor a "person having the equity of redemption" within the meaning of sec. 29, for it does not follow that a person entitled to redeem a mortgage is necessarily an owner of the equity of redemption in the land

and convey all the interest of the mortgagor in the mortgaged lands and tenements.

(2) The equity of redemption in a freehold mortgage of real estate shall be saleable under an execution against the lands and tenements of the owner of the equity of redemption in his lifetime, or in the hands of his executors or administrators after his death, subject to the mortgage, in the same manner as lands and tenements can now be sold under an execution.

31. The effect of the seizure or taking in execution, sale, and conveyance of mortgaged lands and tenements shall be to vest in the purchaser, his heirs and assigns, all the interest of the mortgagor therein, at the time the writ was placed in the hands of the sheriff or other officer to whom the same is directed, as well as at the time of the sale, and to vest in the purchaser, his heirs and assigns, the same rights as the mortgagor would have had if the sale had not taken place; and the purchaser, his heirs or assigns, may pay, remove or satisfy any mortgage, charge or lien which, at the time of the sale, existed upon the said lands or tenements so sold, in like manner as the mortgagor might have done; and thereupon the purchaser, his heirs and assigns, shall acquire the same estate, right and title as the mortgagor would have acquired in case the payment, removal or satisfaction had been effected by the mortgagor; and on payment of the mortgage money to the mortgagee by the purchaser, his heirs or assigns, the mortgagee, his heirs or assigns, shall, if required, give to the purchaser, his heirs or assign, at his or their charge, a certificate of payment or satisfaction of the mortgage, which certificate may be in the following form, that is to say, [setting out form]. And such certificate

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mortgaged. The interest of the defendant as doweress in an equity of redemption does not, therefore, appear to come within sec. 30, and is therefore not saleable under it nor under sec. 33. If, however, the widow is to be treated as one of the owners of the equity of redemption, then still her interest is not saleable by the sheriff, because a sale of her interest would offend against the principles of *Heward* v. *Wolfenden.*

The result is that, in my opinion, there was and is no right to sell this interest under execution in the ordinary manner.

The rules of Court, however, Nos. 1016, 1017, and 1018, seem to offer a summary method of reaching an interest of this nature, which should undoubtedly have been adopted here instead of the remedy by a new action.

The defendant in the present action did not either upon his pleadings, nor at the trial of the action, nor upon the argument before us, suggest this remedy, and it has by both parties been left to the Court to discover it. Under these circumstances,

shall be of the like effect, and shall be acted upon by registrars and others to the same extent as if the same had been given to the mortgagor.

32. A mortgagee of lands and tenements so sold, or the heirs or assigns of the mortgagee (being or not being plaintiff or defendant in the judgment whereon the writ of execution under which the sale takes place has issued), may be the purchaser at the sale, and shall acquire the same estate, interest and rights thereby as any other purchaser ; but in the event of the mortgagee becoming the purchaser, he shall give to the mortgagor a release of the mortgage debt ; and if another person becomes the purchaser, and if the mortgagee enforces payment of the mortgage debt against the mortgagor, then the purchaser shall repay the debt and interest to the mortgagor, and in default of payment thereof within one month after demand the mortgagor may recover the debt and interest from the purchaser, and shall have a charge therefor upon the mortgaged lands.

33. (1) Any estate, right, title or interest in lands which, under sec. 8 of "The Act respecting the Transfer of Real Property," may be conveyed or assigned by any person, or over which he has any disposing power which he may, without the assent of any other person, exercise for his own benefit, shall be liable to seizure and sale under execution against such person in like manner and on like conditions as lands are by law liable to seizure and sale under execution, and the sheriff selling the same may convey and assign the same to the purchaser in the same manner and with the same effect as the person might himself have done.

(2) The right of a married woman to dower shall not be deemed seizable or saleable under execution before the death of her husband.

the bringing of the present action was unnecessary, although it is quite true that the nicety of the question raised by it would have justified the Judge of the county court, before whom the application should have been made, in directing an issue. The defendant is to blame for not having raised the question of practice at once, and she should not have her costs. The plaintiffs should not have brought the action, and therefore should not have their costs. There would be no saving of expense now in referring the plaintiffs back to the proper practice, and in my opinion the proper judgment will be to declare the plaintiffs entitled to a charge upon the estate or interest of the defendant in the lands in question, and to have the same sold under the direction of the Court, and to order the same accordingly, with a reference to the local Master at Walkerton to settle the terms and conditions of sale, etc., and to tax to the plaintiffs the costs subsequent to judgment. No costs to either party down to judgment, and no costs to either party of the appeal. The scale of costs will be that of the county court, unless the interest of the defendant sells for a larger sum than $400, in which case the scale will be that of the High Court.

A. H. F. L.

[DIVISIONAL COURT.]

LLOYD v. WALKER.

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1902
May 22.

Assessment and Taxes—Distress—"Owner"—Agent for Mortgagees in Possession—Conditional Purchase—R.S.O. 1897, ch. 224, sec. 135, sub-sec. 3.

The plaintiff agreed with mortgagees of land in possession to purchase the property at a sum equal to principal, interest and costs, such purchase to be carried out so soon as the mortgagees should obtain a final order of foreclosure, and in the meantime that he should, as their agent, manage the property:—

Held, that the plaintiff, who had not been assessed for the property in question, and against whose name the taxes in question had not been charged on the collector's roll, was not an "owner" of the premises within sec. 35, sub-sec. 3 of the Assessment Act, R.S.O. 1897, ch. 224, whereby the collector is authorized to levy unpaid taxes "upon the goods and chattels of the owner of the premises found thereon," and such taxes could not be levied upon his goods.

APPEAL by the defendant from the county court of the county of York.

The action was brought to restrain the defendant, the tax collector of the township of Whitchurch, from selling under a distress warrant for arrears of taxes upon a certain farm lot in that township, a quantity of building material, cedar posts, etc., found thereon, and admitted to be the property of the plaintiff.

The plaintiff obtained on December 24th, 1901, an *ex parte* injunction restraining the defendant from selling the personal property in question, and on January 7th, 1902, moved upon notice before His Honour Judge McDougall in court to continue it to the trial of the action. This motion was by consent of the parties turned into a motion for judgment, and after argument, judgment was delivered making the injunction perpetual, and ordering the defendant to pay the costs of the action and motion.

From this judgment the defendant appealed, and the appeal was argued before FALCONBRIDGE, C.J.K.B., and STREET and BRITTON, JJ., on April 14th, 1902.

Sidney B. Woods, for the appellant, referred to R.S.O. 1897, ch. 224, sec. 135, sub-sec. 1 (3); *Sawers* v. *Corporation of the City of Toronto* (1901), 2 O.L.R. 717; *Christie* v. *Corporation of the City of Toronto* (1894), 25 O.R. 425, 606;

Horsman v. *Municipal Corporation of the City of Toronto* (1899), 31 O.R. 301; Encycl. of Laws of England, *sub voc.* "Owner."

J. J. Warren, for the respondent, referred to *Regina* v. *Swalwell* (1886), 12 O.R. 391.

May 22. STREET, J.:—By sub-sec. 3 of the first paragraph of sec. 135 of R.S.O. ch. 224, where taxes assessed against land remain unpaid for fourteen days, the collector is authorized to levy the amount "upon the goods and chattels of the owner of the premises found thereon, whether such owner is assessed in respect of the premises or not."

The plaintiff in this action had not been assessed for the property in question, and the taxes in question were not charged against him by name in the collector's roll; but the goods which the collector seized upon the premises were his property, and it is contended that he is the "owner" of the premises within the meaning of the above enactment. The question before us simply is whether this contention is correct.

It appears that one Pegg mortgaged the land in question in 1895 to the Supreme Court of the Independent Order of Foresters for a large sum; on July 10th, 1899, they were in possession under their mortgage, and on that day they entered into the agreement with the plaintiff, upon which the defendant relies as making him the owner of the land. This agreement recites the fact of their being mortgagees in possession, and that they are about to take proceedings to foreclose their mortgage; that the plaintiff has agreed to become the purchaser of the mortgage at a sum equal to the principal, interest and costs; the purchase to be carried out so soon as the vendors should have obtained a final order of foreclosure of the mortgage, upon which event happening and upon payment by the purchaser (the now plaintiff) of $2000, they should convey the premises to him, taking back a mortgage payable by instalments for the balance of the purchase money. In the meantime, and so long as he satisfactorily performed his duties, the purchaser was to be allowed, as the agent of the mortgagees, to manage the property, receive the rents, make sales subject to their approval, and render accounts to them.

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In my opinion, it is clear from the provisions of this agreement that the plaintiff's rights as purchaser were not to take effect *in præsenti*—that is to say, until the foreclosure should be completed—and were to be dependent upon the happening of that event. Until that time arrived he was to pay no part of the purchase money, and was to manage the property as their servant during his good behaviour only.

No other construction can be placed upon the agreement consistently with the obvious intention of the parties that the mortgagees should proceed to foreclose their mortgage preparatory to carrying the agreement into effect; for if the agreement had provided for an immediate acquisition by the now plaintiff Lloyd of the mortagees' rights, they could not have prosecuted the foreclosure proceedings in their own name. It is only upon the construction, which I think is the proper one upon the terms of the agreement, that the mortgagees were to remain owners of the mortgage until the completion of the foreclosure, and were then to convey to the plaintiff, that the proceedings for foreclosure can be treated as regular: *Scott* v. *Benedict* (1889), 9 C.L.T. 181.

As the plaintiff had no estate in the land, and no possession of it save as agent for the mortgagees, and was only to become entitled to an estate in it upon the happening of an uncertain future event, he cannot, in my judgment, be held to be the "owner" of it upon even the most liberal construction of that word, and the action was therefore properly dismissed.

I have not failed to notice that the plaintiff joined with the mortgagees, pending the foreclosure proceedings, in a lease to one Kerr of the premises. That circumstance, however, does not seem to affect the question when the terms of the lease are considered. The lease is expressly made dependent upon the continuance of the rights of the mortgagees, and is to terminate if the mortgagor should redeem. The plaintiff in the present action is properly made a party to it, because under the agreement between him and the mortgagees it would be improper for them to enter into such a lease without his express authority.

The appeal must be dismissed with costs.

BRITTON, J.:—The point in this case is the neat, but difficult one, of determining the meaning of the word "owner" as used in sub-sec. 3 of first part of sec. 135 of the Assessment Act (R.S.O. 1897, ch. 224).

I think a mortgagee in possession would be an "owner" whose goods would be liable to seizure for taxes.

A person who goes into possession under an absolute agreement with the owner of the equity of redemption or with the mortgagee to purchase, would in my opinion be an "owner" within the meaning and for the purposes of this sub-section. In this case the plaintiff, by the terms of the agreement between him and the Supreme Court of the Independent Order of Foresters, was in possession only as agent of the mortgagees, although plaintiff did hold a conditional agreement for the sale of the property to him.

The plaintiff may never become entitled to an absolute conveyance of the property or to an assignment of the mortgage, and so he can not be deemed to be an "owner" as is contended for by defendant.

For the reasons given by my learned brother Street, I think the appeal should be dismissed.

FALCONBRIDGE, C.J., concurred.

A. H. F. L.

[DIVISIONAL COURT.]

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May 23.

BATZOLD v. UPPER.

Evidence—Corroboration—"Some Other Material Evidence"—Interest—Cestui que trust—R.S.O. 1897, ch. 73, sec. 10.

A person interested as *cestui que trust* in a claim in question in a proceeding by or against the executors of a deceased person, is not debarred by reason of such interest from giving the material corroborative evidence required by R.S.O. 1897, ch. 73, sec. 10.

APPEAL by the plaintiff from the county court of the county of Elgin.

The action was brought by the plaintiff Elizabeth Batzold, a widow, to recover from the defendant, who was the widow and administratrix of one Upper, a sum of $300 alleged to have been entrusted to Upper in his lifetime for investment for the plaintiff. The defendant denied the facts upon which the plaintiff relied.

The action was tried before His Honour Judge Hughes and a jury at St. Thomas.

The plaintiff swore that she had handed the money in question to the deceased for investment, telling him that it was money which her husband had directed her to lay aside for the benefit of two of her daughters for their education. The only corroboration to her evidence was the statement of Violet Batzold, one of the two daughters in question, who swore that she had heard her mother counting out $20 bills to Upper, and had heard Upper say that she would get a larger interest than if she paid it into the bank, and that she could have the money back when she wanted it.

A letter was written by the plaintiff to the defendant before the action was commenced in which she stated that she had told the deceased that her husband had wished $300 put aside for the girls, and that Upper had said he would put it away for them, and that if they wanted it the plaintiff could get it back at any time she asked for it; and that the girls were quite pleased at Mr. Upper saving the money for them. The defendant moved for a nonsuit on the ground that there was no corroboration.

The learned Judge left the following questions to the jury:

1st. "Did Mrs. Batzold pay or hand over any money to Mr. Upper?" The answer was "Yes."

2nd. "How much money, if any?" Answer, "$300."

3rd. "Was it handed to Mr. Upper to invest for her daughters, including Violet Batzold?" Answer, "Yes."

The 4th question was of no importance here.

The 5th question was, "For what purpose was the money handed to Mr. Upper if it was not for the benefit of the daughters?" Answer, "For no other purpose."

The learned Judge having reserved the defendant's motion for a nonsuit, considered that and the plaintiff's motion for judgment on the findings of the jury together, and gave judgment dismissing the action with costs upon the ground that Violet Batzold was an interested party and that her evidence was therefore no corroboration of that of the plaintiff, her mother; and further, upon the ground that upon the findings of the jury the plaintiff had no interest in the money after handing it over to Upper to invest for her daughters who thereafter became entitled to it.

The plaintiff appealed, and her appeal was argued before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., and STREET and BRITTON, JJ., on April 16th, 1902.

J. S. Denison, for the plaintiff appellant, referred to *In re Curry, Curry* v. *Curry* (1900), 32 O.R. 150.

W. A. Wilson, for the defendant respondent, referred to *Stoddart* v. *Stoddart* (1876), 39 U.C.R. 203, 212; *Taylor* v. *Regis* (1895), 26 O.R. 483.

May 23. The judgment of the Court was delivered by STREET, J.:—The defendant in her pleadings in this action has merely denied the receipt by the deceased of the money claimed by the plaintiff. She has not set up any *jus tertii*, nor was any suggestion made from beginning to end of the trial that the plaintiff was not entitled to recover the money if the jury found that she had handed it to the deceased. The questions fought out were, 1st, Did the plaintiff hand the money to the deceased? and 2nd, If she did, was the witness Violet Batzold interested in it as a *cestui que trust*? The latter question

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was considered because of the possible bearing it might have upon the sufficiency of the corroboration of the plaintiff's evidence. The questions submitted to the jury must be read in the light of the evidence and the contentions raised at the trial. The third and fifth questions must, therefore, be construed as intended merely to raise the question whether the daughters were interested in the money as *cestuis que trust* and the answers to them as affirming that they were, for there was no evidence that the plaintiff had intended to part with her legal title to the money and the jury were not asked to consider that question at all, nor was it raised either upon the pleadings or otherwise. We must take it, however, that in the opinion of the jury the plaintiff was a trustee of the money for the benefit of her two daughters, of whom Violet Batzold, the witness, was one, and the question is whether the plaintiff's evidence was sufficiently corroborated, as required by the statute, by the evidence of Violet Batzold. In point of substance, I think there can be no doubt that the facts sworn to by her were sufficient corroboration. She says she heard her mother counting out money to Upper, and that Upper said "it was all right, she could get it any time she wanted it," and "that she would get a larger interest on the money than if she paid it into the bank." These statements were consistent only with the story told by the plaintiff of the matter and were entirely inconsistent with the suggested explanation that the plaintiff was merely paying Upper the rent she owed him. The jury were at liberty to refuse to believe them if they thought proper, but they were properly charged that the plaintiff was not entitled to a verdict without corroboration, and they have found in her favour, so it must be assumed that they believed Violet Batzold's story.

The only question remaining to be determined, therefore, is whether Violet Batzold's evidence for any reason should be held to be insufficient corroboration of that of the plaintiff, because of the fact that she was a *cestui que trust* of the money in question. The statute provides (R.S.O. 1897 ch. 73, sec. 10) that "In any action or proceeding by or against the heirs, executors, administrators or assigns of a deceased person an opposite or interested party to the action shall not obtain a verdict, judgment or decision therein on his own evidence in respect of any

matter occurring before the death of the deceased person unless such evidence is corroborated by some other material evidence."

This section, applied to the present case, means that Mrs. Batzold cannot obtain a verdict on her own evidence unless she has been corroborated by some other material evidence. The evidence of Violet Batzold was, in my opinion, material evidence corroborating that of the plaintiff, and there is nothing in the Act which would justify a Judge in declining to submit it to the jury as corroboration. Her interest in the result might well be considered by the jury in considering the weight to be attached to it, but the evidence could not be withdrawn from their consideration.

In my opinion the appeal must be allowed with costs, and the judgment in the Court below must be set aside and a verdict entered for the plaintiff for $300, with interest at 5 per cent. from August 13th, 1899, and costs.

A. H. F. L.

[IN CHAMBERS.]

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June 4.

WHEELER v. TOWN OF CORNWALL.

Parties—Third Party—Settlement of Action.

After a third party had been brought in and the usual directions as to trial given the action was settled as between the plaintiff and the defendants :—
Held, that the defendants could not proceed to trial as against the third party, and the action was dismissed as against the latter with costs, without prejudice to the right of the defendants to bring an action against him.

APPLICATION by the third party for an order that the action be dismissed as against him for want of prosecution, argued before Mr. Winchester, Master in Chambers, on the 2nd of June, 1902.

J. H. Moss, for the third party.
D. W. Saunders, for the defendants.

June 4. THE MASTER IN CHAMBERS:—It appears that the defendants have settled the action with the plaintiff and that there is nothing to try as between them. Counsel for the defendants asked liberty to proceed to trial, but this cannot be done as they have, without the consent of the third party, settled with the plaintiff, and under the order giving directions as to the disposition of the issue between the defendants and the third party it was directed that the question of the liability of the third party be tried and disposed of at the trial of this action. This was not done at the sittings mentioned in the order owing to the settlement referred to. This trial cannot now be had, and the third party is therefore entitled to be dismissed from this action: see *Caister* v. *Chapman*, [1884] W.N. 31, and *Rich* v. *Darrett* (1884), 28 Sol. Jour. 513. The action, so far as the third party is concerned, will be dismissed with costs to be paid to him by the defendants. This is to be without prejudice to the defendants bringing an action against the third party if so advised.

R. S. C.

[IN CHAMBERS.]

DULMAGE V. WHITE.

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March 15.

Trial—Venue—Agreement before Action.

A conditional sale agreement provided that "in case of any litigation arising in connection with this transaction it is agreed that the trial will be held only in (the place where the vendors carried on business)":—

Held, that this condition was binding, and, in an action by the purchaser to recover damages for breaches of the agreement, an order was made changing the place of trial to the place agreed upon, although the balance of convenience was in favour of the place named by the plaintiff in his writ.

MOTION by the defendants for an order to change the place of trial, argued before Mr. Winchester, the Master in Chambers, on the 13th of March, 1902. The facts are stated in the judgment.

C. A. Swabey, for the defendants.

A. R. Clute, for the plaintiff.

March 15. THE MASTER IN CHAMBERS:—The action is brought by the purchaser of an engine from the defendant company under a written contract dated 4th April, 1900, whereby the plaintiff agreed to purchase the engine for $600 and exchange another engine, the $600 being secured by three notes for $200 each, payable on the first days of January in 1902, 1903 and 1904 respectively. The plaintiff, claiming that the engine purchased by him is worthless and wholly unfit for the purpose for which it was intended, asks that the defendants be restrained from negotiating the said notes and that the same and the engine he exchanged be returned to him, and the lien on his lands be discharged, and for $500 damages for breaches of the contract. The plaintiff in his statement of claim laid the venue at Picton and this the defendants seek to have changed to London on the ground that under the contract the trial should be at London, and also on the ground of preponderance of convenience.

So far as the question of convenience of witnesses arises, I must hold on the evidence that the plaintiff is entitled to hold the venue at Picton. The question then is, whether under the contract he is bound to lay it at London. He contends that

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the defendants having committed a breach of the contract it is no longer a binding or completed contract, and that the part relating to the place of trial is therefore inoperative. I do not think I can accede to this argument. It is true that the plaintiff claims that the defendants have committed a breach of the contract, but this is denied by the defendants and that question must be disposed of at the trial. There is no statement made that the clause in question was improperly added or was misunderstood by the plaintiff at the time of the execution of the contract, which is admitted by plaintiff. There is no doubt the agreement was never abrogated as claimed by plaintiff; his own evidence is clear as to that point. In my opinion the plaintiff is bound by his agreement, which reads as follows: "In case of any litigation arising in connection with this transaction, or in reference to the engine or machinery mentioned herein, it is agreed that the trial will be held only in the city of London," and that the trial must take place in London and not at Picton. In an old case of *Furnival* v. *Stringer* (1834), 1 Bing. N.C. 68, it was held that where by consent of both parties the venue was laid in London, no objection could afterwards be taken to the venue, notwithstanding it ought, under an Act of Parliament, to have been laid in Surrey. The cases cited by counsel for defendants bear this out, viz., *Tharsis Sulphur Co.* v. *Société Industrielle des Métaux* (1889), 60 L.T. N.S. 924; and *Montgomery* v. *Liebenthal*, [1898] 1 Q B. 487.

The place of trial will be changed from Picton to London. Costs in the cause.

R. S. C.

[LOUNT, J.]

SKILLINGS V. ROYAL INSURANCE COMPANY.

1902
June 5.

Insurance—Fire Insurance—Cancellation—R.S.O. 1897 ch. 203—Statutory Condition 19 (a)—Notice of Cancellation Received After Loss.

The insured sent to the company his policy with an endorsed surrender clause executed, and a letter asking that the insurance be terminated and the unearned proportion of the premium repaid. Owing to its misdirection by the insured the letter was delayed in the post-office and did not reach the company till the morning after the insured goods had been destroyed by fire :—

Held, that the letter did not take effect from the time of its being posted, but only from the time of its receipt; and that the relationship of the parties had been so changed by the occurrence of the fire before its receipt that the attempted surrender did not operate, and therefore that the company were liable for the loss.

TRIAL of an action to recover a loss under an insurance policy, before LOUNT, J., at the non-jury sittings at Toronto on the 11th and 13th of January, 1902. The facts are stated in the judgment.

Riddell, K.C., and *A. Fasken*, for the plaintiffs.

Robinson, K.C., and *C. S. MacInnes*, for the defendants.

June 5. LOUNT, J.:—By their statement of claim the plaintiffs, lumber merchants having their head office at Ogdensburg, in the State of New York, seek to recover from the defendants on a policy of insurance for $10,000, dated the 24th of January, 1901, insuring for one year from the 21st of January, 1901, a quantity of lumber at Parry Sound, which was destroyed by fire on the night of the 5th, and morning of the 6th, of June, 1901. The plaintiffs allege that no written notice terminating the insurance had been given by them to the defendants or their authorized agent in accordance with the provisions of condition 19 (*a*) of the statutory conditions, R.S.O. 1897, ch. 203, "The Ontario Insurance Act," nor was the insurance cancelled or surrendered before the lumber was destroyed by fire; that on the 5th of June, 1901, a fire occurred whereby the lumber insured was destroyed to the extent of $59,737.30; that at the time of the fire the plaintiffs were otherwise insured on the lumber to the amount of

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$62,000; that the insurance was in full force when the fire occurred, and they claim from the defendants $8,296.85, with interest from the 5th of June, 1901.

The defendants say their liability was from twelve o'clock noon on the 21st of January, 1901, to twelve o'clock noon on the 21st of January, 1902, subject to the terms and provisions of the said conditions; that by the condition 19a the insurance may be determined by the plaintiffs giving written notice to that effect to the defendants; that on or about the 30th of May, 1901, the plaintiffs wrote to Mr. Lett, the authorized agent of the defendants at the town of Barrie, with whom the insurance had been effected, enclosing to him the policy, and stating that they wished to cancel it as of the 5th of June; that the plaintiffs endorsed on the policy a statement that the policy was thereby cancelled and surrendered; and they say that by such written notice the policy was cancelled and is now in their possession as a cancelled and surrendered policy; that they retained the customary short rate for the time the insurance had been in force, and they forwarded to the plaintiffs, as requested by them, the balance of the premium paid ($78.35), which the plaintiffs returned to the defendants; and to cover this amount and interest thereon they bring into Court $82 in payment of the balance of the premium to which the plaintiffs were or are entitled. They deny that any damage by fire occurred to the property during the currency of the policy, or that the property was damaged on the 5th of June to the extent of $59,737.80, or to any extent whatever, and they submit that if any damage did occur on the 5th of June they are not liable for any damage which may have occurred on that day subsequent to twelve o'clock at noon. Other defences are set up but were not relied upon at the trial.

On the 30th of May, 1901, the plaintiffs wrote from Ogdensburg to Mr. Lett, the defendants' agent at Barrie, as follows:—

"Enclosed please find Royal policy 7535269. Lumber located at Conger Lumber Company's yard at Parry Sound, Ont., expiring January 21st, 1902, which we wish to cancel as of June 5th. We make return premium as $74.25. If correct kindly send us cheque for same and oblige." The policy was enclosed with this letter in an envelope which by

mistake of the plaintiffs' stenographer was not correctly addressed, the address being "Mr. F. A. Lett, agent, Parry Sound, Ont.," when it should have been "Barrie" instead of Parry Sound. The policy had endorsed on it at the time, partly printed and partly written, the following: "Surrender. Received from the Royal Insurance Company the sum of seventy-four and $\frac{25}{100}$ dollars, being the consideration for the within policy which is hereby cancelled and surrendered." This was signed by the plaintiffs.

The post stamp on the envelope shows that it was received at the post office "Ogdensburg" on the 30th of May, 1901, at the post office "Parry Sound" on the 31st of May, 1901, and at the post office "Barrie" on the 6th of June. It is admitted by the defendants that the envelope, with its contents, the letter and policy, were not received at Barrie by Mr. Lett until half past eleven on the forenoon of the 6th of June, and that it had been forwarded by the post master at Parry Sound by post to Mr. Lett at Barrie. The fire had taken place before the arrival of the letter at Barrie; it began about eleven p.m. on the night of the 5th of June, and terminated by five a.m. on the 6th of June. On the morning of the 6th of June, and before the letter had been received by Mr. Lett, Mr. Bartlett, the agent at Orillia for the plaintiffs, telephoned to Mr. Lett informing him of the fire, to which Mr. Lett, immediately after, and before the receipt of the letter, replied by letter, asking for information; and about the same time he telegraphed to the defendants at their head office, Montreal, informing them of the fire, and on the same day, at 12.35 p.m., he telegraphed the defendants' head office: "Have just received letter from Skillings, Whitings & Barnes, dated May 30th, missent to Parry Sound, ordering policy on lumber at Parry Sound cancelled, receipt for rebate signed by the firm. Shall I send them cheque for rebate?" To which the defendants replied by telegram: "Yes. Mail cheque for rebate immediately. Send us any further particulars you receive."

Mr. Lett afterwards, on the same day, wrote to the plaintiffs: "Your favour of the 30th ult. enclosing cancelled policy 7535269 is received, the envelope containing your letter was addressed to me at Parry Sound instead of Barrie, and has

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been forwarded to me here from Parry Sound, hence the delay in sending you cheque for rebate. With regard to amount of rebate, I beg to point out that the earned percentage in this case is 52½% as per the enclosed slip which I send you for future reference, the policy having run five months from 21st day of January. The amount to be returned you, therefore, is at 47½%, making rebate $78.35, and I now enclose cheque for this amount. Also amended rebate slip which kindly sign and return.

We learn from Mr. Bartlett, your agent at Orillia, that a fire occurred in some of your lumber at Parry Sound this morning, but we understand from him that the lumber burned was at the 'Spar' and not at the 'Circle.'"

The rebate slip enclosed in this letter is as follows: "Surrender. Endorsement made at the Barrie Agency Royal Insurance Company on Policy No. 7535269. Name of assured, Skillings, Whitings & Barnes Lumber Company. Date of expiry, 21st January, 1902; date of endorsement, June 5th, 1901.

Received from the Royal Insurance Company the sum of seventy-eight $\frac{35}{100}$ dollars, being the consideration for within mentioned policy No. 7535269, which is hereby surrendered and declared cancelled."

The plaintiffs at once returned to the agent Lett the cheque for $78.35 and the rebate slip, saying that until it was determined whether the policy was legally cancelled or was still in force they declined to accept the cheque or sign the slip.

Further correspondence took place not, however, affecting the question under consideration.

Condition 19 (*a*) of the Ontario statutory conditions provides: "The insurance, if for cash, may also be terminated by the assured by giving written notice to that effect to the company or its authorized agent, in which case the company may retain the customary short rate for the time the insurance has been in force, and shall repay to the assured the balance of the premium paid."

In 1 May on Insurance, 4th ed., sec. 67, it is said: "The right of cancellation on notice, reserved by the terms of the policy to either party, should be exercised with care that the notice be

explicit, and the conditions strictly complied with"; and to the same effect, 2 Joyce on Insurance, sec. 1660: "The right to rescind or cancel can only be exercised by either party acting strictly in compliance with the exact stipulations of the policy relating thereto," citing with approval many American authorities, where the law in this respect is in the different States, and especially in the State of New York, similar to that expressed in condition 19 (*a*). See also the judgment of MacMahon, J., in *Bank of Commerce* v. *British America Assurance Co.* (1889), 18 O.R. 234, at p. 241, approving of *Runkle* v. *Citizens Ins. Co.* (1881), 6 Fed. Rep. 143, at p. 148, where it is said: "The right, however, to terminate a contract of insurance which has been fairly entered into, and has taken effect, by this method, is a right which can only be exercised by either party by a strict compliance with the terms of the policy relating to cancellation." The learned Judge also refers to May on Insurance, 2nd ed., sec. 574; *Chase* v. *Phœnix Mutual Life Ins. Co.* (1877), 67 Me. 85; and *Hathorn* v. *Germania Ins. Co.* (1869), 55 Barb. (N.Y.) 28, as to the strictness required in complying with the conditions cancelling a policy of insurance.

Condition 19 (*a*) does not provide how the notice shall or may be given. Condition 23, however, is: "Any written notice to a company for any purpose of the statutory conditions, where the mode thereof is not expressly provided, may be by letter delivered at the head office of the company in Ontario, or by registered post letter addressed to the company, its manager or agent, at such head office, or by such written notice given in any other manner to an authorized agent of the company."

No written notice was delivered at the defendants' head office in Ontario; in, fact it was not shewn that the defendants had a head office in Ontario; the only head office spoken of was at Montreal, and no written notice was delivered there. Nor was any registered post letter or letter or notice of any kind addressed or sent by the plaintiffs to the defendants, their manager or agent, at any head office.

Then, was a written notice given in any other manner to an authorized agent of the defendants? Was the letter of the 30th of May with the policy having the surrender thereof endorsed thereon, a sufficient notice to satisfy condition 19 (*a*), and was

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the receipt thereof by Mr. Lett, the authorized agent of the defendants, on the 6th of June, after the fire had occurred and the property had been destroyed, a notice to the defendants in compliance with condition 23?

In my opinion it was not. Upon the authorities, I must hold that a letter sent by post giving such notice is not notice by depositing the letter in the post-office; it can only become so when received from the post-office by the party to whom it is addressed.

The post-office had not been made the agent of the defendants to receive such notice. The law is well settled that if an offer made by mail is accepted by mail the contract is complete from the moment the letter of acceptance is mailed, even if it was never received; but this does not apply here, because no negotiation was pending, no contract had been proposed in writing; the plaintiffs had not made any offer in writing to the defendants that might or might not have been accepted. The plaintiffs sought to do an act that would be binding on the defendants, whether they were willing or not. The policy and letter might have been sent by a messenger, who would have been the agent of the plaintiffs for the purpose. Having been sent by mail, the post-office was none the less the agency of the plaintiffs than if a messenger had been sent. But it was necessary for the plaintiffs, in order to terminate the policy, to have the notice actually reach the defendants or its authorized agent, and the instrument selected for that purpose was the agent of the plaintiffs, not of the defendants; nor can the fact that the plaintiffs signed the form of surrender on the policy make any difference. It was not intended to operate and could not operate until received, and the defendants had complied with the terms of condition 19 (*a*), that is, paid to the plaintiffs the balance of the premium which the plaintiffs had paid to the defendants. Nor could it operate against the plaintiffs until delivery had taken place. The policy all the time until actually received by the defendants or their authorized agent being in the possession of the plaintiffs, during which time the property had been destroyed, was therefore in force when the loss occurred; the character of the contract was changed from a contingent to a certain liability, and a cause of action based on

an absolute debt forthwith accrued to the plaintiffs: *Crown Point Iron Co.* v. *Ætna Insurance Co.* (1891), 127 N.Y. 608; May on Insurance, 4th ed,, sec. 67.

"Notice of cancellation, if given by mail, must be received before loss by the party entitled thereto or by his agent authorized to receive the same otherwise there is no cancellation:" 2 Joyce on Insurance, sec. 1669.

I have not lost sight of the fact that it was by the mistake of the plaintiffs in not addressing the letter of the 30th of May to Mr. Lett at Barrie, that it was not received by him before the fire, but I do not see how this can in any way affect the question.

Judgment in favour of the plaintiffs for the amount claimed by them with interest from the 5th of June, 1901, and costs.

R. S. C.

[IN CHAMBERS.]

1902

June 17.

In the Matter of the Estate of Parish Chapman.

Will—Construction—Gift During Life Conferring Absolute Interest—Intestacy.

A testator gave to his sister-in-law for her natural life the interest of a sum of $500, and provided that at her death this $500 was to be given to her eldest son, and that he could use this "sum for his benefit during his natural life." He then purported to give to his wife all his property that might remain after the disposition of the $500, the same to be sold and the proceeds invested, and the interest of the same to go to his said wife "for her sole benefit during her natural life," and he directed that at her death the portion given her should be divided equally amongst certain named persons "all to be for their benefit during their natural lives."

Held, that there was no intestacy. The gift to the eldest son was an absolute one of the $500; and on the death of the wife the residue of the estate was immediately divisible among the beneficiaries named.

This was a motion by the executors of the will of Parish Chapman, deceased, under Consolidated Rule 938, for determination of certain questions arising in connection with his estate and for the construction of his will.

The will provided as follows:—

"I give unto my sister-in-law Mary Ann Smith the sum of $500, said sum to be deposited in a bank, and she is to draw the interest of said $500 for her benefit during her natural life, and at her decease the said principal $500 is to be given to her eldest son Edward Chapman Smith to be used for his benefit during his natural life.

2nd. I give unto my beloved wife Jane Chapman all which may remain after the disposition of the aforesaid $500, consisting of all my real and personal property, consisting of my farm, including all implements, live and dead stock, all buildings and dwelling house with all household furniture therein, useful and ornamental, also all monies in bank or banks wherever they may be deposited, with the interest accruing thereto, and any and all mortgages and notes with the interest thereon that I hold or may hold at the time of my decease; and said executors hereinafter named shall immediately after my decease dispose of all the aforesaid property by sale, and the proceeds or monies arising from such sale shall safely be deposited where good

security can be obtained, and the interest of the same shall go to my beloved wife Jane Chapman for her sole benefit during her natural life.

3rd. And at the decease of my wife the portion given unto her shall be divided equally among the following persons: [naming them]. All to be for their benefit during their natural lives."

The questions to which answers were asked were as follows: (1) Upon the death of Jane Chapman, the widow of the said Parish Chapman, is that portion of the *corpus* of the said estate, directed by the second paragraph of the will of the said Parish Chapman to be held in trust during the life of the said Jane Chapman, immediately divisible among the persons named in the third paragraph of the said will.

(2) Do the said named persons or their representatives take an absolute interest in the said property or a life interest only?

(3) Is the sum of $500 in the first paragraph of the will mentioned an absolute gift to Edward Chapman Smith by the death of his mother Mary Ann Smith therein mentioned, or has he a life interest therein only.

(4) Did the testator die intestate as to any of the said property?

The motion was argued on June 16th, 1902, before BRITTON, J., in Chambers.

J. J. Maclaren, K.C., for the executors, stated that he had been unable to find authority in point.

N. W. Rowell, for David Porkess, executor under the will of Jane Chapman, widow of the testator, and for the said David Porkess personally, cited *Savage* v. *Tyers* (1871), L.R. 7 Ch. 356.

F. W. Harcourt, for the infants.

June 17. BRITTON, J.:—The testator made his will on August 12th, 1887, and he died on October 17th following.

In addition to the presumption against intestacy as to any portion of the testator's estate, there is internal evidence in the will itself that this testator intended then, and by that will, to dispose of all he had. I quite concede, what was argued by Mr. Rowell, that a Judge ought not, because of any

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difficulty or embarrassment that would or possibly could arise from declaring intestacy as to the *corpus* or any part of the estate, to hesitate to so declare. It is for me, if possible, to ascertain from this will what was the intention of the testator. Lord Cottenham said in *Lassence* v. *Tierney* (1849), 1 Mac. & G. 551, cited in *Hancock* v. *Watson*, [1902] A.C. 14 at p. 22, "If the terms of the gift are ambiguous, you must seek assistance in construing it—in saying whether it is expressed as an absolute gift or not—from the other parts of the will."

The testator here gives $500 to Ann Smith, but he limits the disposition of that, so that in reality she gets for her own use absolutely only the interest upon it. At her death this $500 "is to be given to her eldest son, Edward Chapman Smith," and this sum, not the interest alone, he can use "for his benefit during his natural life."

Then the testator gives to his wife Jane Chapman all that remains after the $500 is taken out, but he limits her for her own use absolutely to the interest only, and when the capital is no longer needed to earn interest for his wife, he gives it all to the persons named, and *all* "for their benefit during their natural lives."

I can come to no other conclusion than that the testator intended to make and did make a careful selection of those named from the possible claimants upon his bounty. He intended to dispose of all his estate. He knew of those relatives of his who, if not mentioned, could, in the event of intestacy, claim; and I think he intended, and by his will carried out, his intention of disposing of all absolutely, by a payment over of the $500 after the death of Ann Smith, and by a division of the rest after the death of Jane Chapman.

"A gift even of income to A for life and then to B indefinitely gives B the absolute interest:" Theobald on Wills, 5th ed., p. 428; *Clough* v. *Wynne* (1817), 2 Mad. 188. This seems to me a stronger case in favour of the persons named in the will.

The questions will be answered as follows:—

(1) That portion of the *corpus* of the estate of Parish Chapman, directed to be held by the executors in trust during the life of Jane Chapman, is to be immediately divisible among

the persons named in the third paragraph of Parish Chapman's will and their representatives.

(2) Said persons and their representatives take an absolute interest in the said property.

(3) The sum of $500 in the first paragraph of the will mentioned is an absolute gift to Edward Chapman Smith, and upon the death of his mother the said Edward Chapman Smith shall be entitled to said sum absolutely.

(4) The said testator did not die intestate as to any of his property or estate.

(5) Costs of all parties out of the estate.

A. H. F. L.

[BOYD, C.]

1902
May 19.

IN RE THE CANADIAN PACIFIC RAILWAY COMPANY AND THE CORPORATION OF THE CITY OF TORONTO.

Landlord and Tenant—Lessee of City—Liability to Pay Taxes—Usual Covenants —Assessment Act, R.S.O. 1897, ch. 224, sec. 7, sub-sec. 7—Ib., sec. 26—Railway Committee of Privy Council.

City property when occupied by a tenant other than a servant or officer of the corporation occupying the premises for the purposes thereof, is subject to taxation (R.S.O. 1897, ch. 224, sec. 7, sub-sec. 7); and such tax is a tenant's tax, payable by him and not in any event payable by the landlord as between him and the tenant unless by express agreement.

Section 26 of the Assessment Act (R.S.O. 1897, ch. 224) as to tenants deducting taxes from their rent has no application to such a case, as it applies only to taxes which can be legally recovered from the owner; nor does that section apply to the case of a term held in perpetuity, as here.

Semble, also, that where the tenant, as in this case, holds in perpetuity under a renewable lease, he may be regarded as the "owner" within the meaning of the Assessment Act, and as such is liable to taxation without recourse to the owner in fee.

Where the municipality had entered into a written agreement with a railway company to grant a lease for successive terms of fifty years each during all time to come, for rent specified, but no mention had been made of taxes:—

Held, that the fixing of the rent payable to the city did not interfere with the right of the latter in its governmental capacity and exercising its sovereign power to lay taxes upon the property when under lease. Taxes and rent are distinct things, and collectible by the corporation in different capacities, and the imposition of the yearly taxes is not a derogation from or inconsistent with the contract.

Primâ facie, a covenant by a tenant to pay taxes is a "usual" covenant (so decided in this case, 27 A.R. 54), and it lay upon the tenant here objecting to give it to shew by competent evidence that it was not so in such a case as this or in this country, which the tenant had failed to do.

Held, also, that no covenant to repair should be inserted in the lease here, the jurisdiction to keep the railway in effective operation and the like resting entirely with the Railway Committee of the Privy Council, and it not having been shewn that this was insufficient to protect the city.

THIS was an appeal by the Canadian Pacific Railway Company from the report of James S. Cartwright, official referee, dated March 4th, 1902, in this matter which, as recited in the report, arose in the following way:—

"Sometime in the year 1885 or 1886 the Canadian Pacific Railway Company desired to obtain an independent access into the city of Toronto, and a separate station—advantages of which up to that time they had been deprived. For this purpose they proceeded to procure by purchase or expropriation what was known in the history of this matter as 'the original site.'

For reasons not now material for consideration, strong objections were raised by the citizens of Toronto to this 'original site' being acquired by the Canadian Pacific Railway Company and devoted by them to the contemplated uses. In deference to these objections, the city council endeavoured to prevent this plan from being carried into effect, and applied to the Court for an injunction to restrain the expropriation proceedings. Before, however, matters had reached any final issue—that is, in litigation—negotiations were commenced between the Canadian Pacific Railway Company and the city. After a good deal of delay, and adjustment of certain points raised on either side, it was finally agreed that the Canadian Pacific Railway Company should abandon the 'original site' and accept instead what was known as the 'alternative site.' An agreement to this effect was drawn up known as the 'esplanade or tripartite agreement.' This was sanctioned by an Act, 55 Vict. ch. 90, sec. 2 (O.), and appears in full as a schedule to that Act. The agreement was afterwards executed on July 26th, 1892, and by an Act of the Parliament of Canada, 56 Vict. ch. 47, the agreement in question was further confirmed and authorized. These Acts were necessary to enable the parties to carry out the provisions of the agreement which had provisionally been made, and included many matters of considerable importance, some of them necessitating large expenditures of money, which were not in question now. The 19th clause of that agreement, as set out in the above Acts, is as follows:—

'19. The city agrees, with the assistance of the Canadian Pacific as hereinafter mentioned, to obtain such title to the alternative site as will enable it to convey the same to the Canadian Pacific to the extent and in the manner hereinafter described, and the Canadian Pacific agrees to consent to and assist the city in obtaining the said alternative site with all convenient speed, and that it will, at the expense and upon the request of the city, exercise its powers of expropriation for that purpose, except as regards the said property owned or held under lease by the Grand Trunk. The city agrees to indemnify the Canadian Pacific for all moneys, costs and charges that the company may have to pay for the expropriation of the outstanding interests of the leaseholders of lots 5 to 25 inclusive,

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registered plan D, 118 (being part of the alternative site), and to carry out the agreements that have been made by the Canadian Pacific with the Argonaut Boat House Company, W. H. Clindinning, and the Toronto Yacht Club Company, which are printed as schedules A, B, and C hereto, and the city agrees to pay to the Canadian Pacific the cost of cribbing and filling on the alternative site of equal quantity to that which it shall have done on the original site, or any part of it, up to the time it surrenders possession of the same to the city under this agreement; also the cost of construction and erection of the wharves and buildings on the original site. And the city further covenants and agrees to demise and lease the alternative site to the Canadian Pacific for successive terms of fifty years each, during all time to come. The rental for the first term of fifty years shall be eleven thousand dollars per annum, and the rental for each subsequent term of fifty years shall at each renewal be increased by two thousand seven hundred and fifty dollars per annum, and all rent shall be payable on the third days of July, October, January and April of each year. For the first quarter a proportionate amount to be paid, having regard to the time of possession under said lease.'

No date was fixed for the commencement of the term, which rendered the agreement (apart at least from legislative sanction) inoperative: see Woodfall, Landlord and Tenant, 15th Eng. ed., p. 160, and authorities there cited. For this probably, among other reasons, a further agreement was entered into between the Canadian Pacific Railway Company and the city dated February 4th, 1895, clause 2 of which is as follows: 2. The first term of fifty years mentioned in the clause 19 of the esplanade agreement is to commence on January 1st, 1895.

Clause 12 says: An abstract of title to the alternative site is to be furnished, and the title is to be examined and approved of within a month from the delivery of such abstract.

Subsequently upon the petitions of the Canadian Pacific Railway Company, and with consent of counsel for all parties, an order was made on April 7th, 1896, of which the operative part was as follows: 'This court doth order that the respondents do deliver to the petitioners an abstract of title of the alternative site under the said agreements mentioned, and that it be referred to James S. Cartwright, Esquire, referee, and that

all matters as to time of delivery of the abstract, the sufficiency thereof, and all subsequent questions arising out of or connected with the title to the said site, and the carrying out of the said agreements respecting the making of title to, and the conveying of the said alternative site, be from time to time determined by the said referee, including the costs of the said reference, subject to appeal.'

The abstract was not brought before me until November 30th, 1897. Finally on May 28th, 1898, the abstract was declared perfect, and the title was accepted by the lessees.

On June 20th, 1898, the draft lease was for the first time brought in and considered. Certain objections and suggestions were served on the city solicitor during the vacation of that year, but no further progress was made in the matter until May following. A second draft lease had been filed by the city in April, 1899, and on May 10th, 1899, a draft lease was filed by the Canadian Pacific Railway Company as containing their view of what was the proper form of the lease to be drawn in pursuance of clause 19 of the esplanade agreement, and of clause 2 of the agreement of February 4th, 1895, as well as in pursuance of the various provisions of the other agreements of January 31st, 1893, and August 2nd, 1893.*

From a comparison of these drafts and from the discussions respecting their differences, it appeared that there were three main points of disagreement between the parties.

First and chief, whether or not the lease should contain a covenant on the part of the lessees to pay taxes.

Secondly, from what date the rent should be made payable —counsel for the city contending that the date was January 1st, as fixed by clause 2 of the agreement of February 4th, 1895, as the commencement of the term, and counsel for the Canadian Pacific Railway Company contending that rent should only begin on May 28th, 1898, being the date on which the title was first accepted by the lessees.

Thirdly, there was also the question of considerable practical importance in this case, viz., whether in case the contention of the city prevailed as to the date from which the rent is payable, the arrears should bear interest.

*The provisions of these two last-mentioned agreements are not material to the present report.—Rep.

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On May 10th, 1899, counsel for the city tendered evidence to shew that a covenant by the lessees to pay taxes was a usual covenant, and one to which the lessors were entitled under the wording of clause 19 of the esplanade agreement. The right to do this was disputed by counsel for the railway, but the referee held the evidence admissible, and at the request of counsel for the railway gave a certificate to that effect as follows:—

'Wednesday, May 17th, 1899.

I certify that in the progress of the reference to me under the order herein, bearing date April 7th, 1896, a draft lease was brought in by the city corporation on June 30th, 1898, and objections thereto were put in by the railway company, and on the consideration thereof a further draft was put in by the city corporation, both drafts containing a covenant to pay taxes, and a third draft was put in by the railway company, and thereupon the city corporation tendered evidence to establish that a covenant by the railway company to pay taxes should be inserted in the lease, and I rule that evidence is admissible, and that I will receive evidence on the question of whether a covenant for payment of taxes by the railway company ought or ought not to be inserted in the lease.'

This ruling was upheld by Chief Justice Armour. The case was then carried to the Court of Appeal with the same result, as reported 27 A.R. 54. A further appeal to the Supreme Court was quashed on the ground that the decision appealed from was not final.

The reference had been stayed until the final disposition of the above appeal, and the matter was not taken up again until June, 1900, and was not concluded until June, 1901."

The rulings of the referee in his report are sufficiently indicated in the judgment of BOYD, C., and also in clause 6 of the report, which was as follows:—

"(6) And I find that the petitioners ought to pay the full rent for the demised premises from January 1st, 1895, together with interest on the same, and having taken an account of what is due by the lessee to the lessor for rent in respect of the lands demised, I find that the rent from the said 1st day of January, 1895, up to January 3rd, 1902, is the sum of $92,945.07; of which amount there is due for principal

$77,070, and for interest thereon the sum of $15,875.07; and having determined that the said lease should contain a covenant by the lessee to pay taxes, and having taken an account of what is due for taxes from the said 1st day of January, 1895, to December 31st, 1901, I find that there is due the sum of $36,963.55, and for interest thereon up to February 3rd, 1902, the sum of $7,014.09."

The main point of objection to the report argued by the appellants was that there should be no covenant inserted in the lease for the payment of taxes by the appellants under the above circumstances. Other minor points of objection, however, were also raised.

The appeal was argued on April 29th, 30th, and 31st, and May 1st and 2nd, before BOYD, C.

E. D. Armour, K.C., and *A. MacMurchy*, for the appellants, contended that their clients could not be held by implication liable for something which they expressly refused to have put into the agreement: *Ogilvie* v. *Foljambe* (1817), 3 Mer. 53, 64-5; *McMurray* v. *Spicer* (1868), L.R. 5 Eq. 527; *In re Gloag and Miller's Contract* (1883), 23 Ch. D. 320, 327; *Ellis* v. *Rogers* (1885), 29 Ch. D. 661, 671; *Taylor* v. *Smith*, [1893] 2 Q.B. 65, at pp. 72, 75; *Village of New Hamburg* v. *County of Waterloo* (1891), 22 O.R. 193, at p. 198; *Smith* v. *Cooke*, [1891] A.C. 297; *Erskine* v. *Adeane* (1873), L.R. 8 Ch. 756, at p. 763; *Rich* v. *Jackson* (1794), 6 Ves. 334*n*; that the agreement in question here was unique in character, and therefore "usual" covenants should not be implied as intended to be inserted; that the municipality was bound by its agreement as a private party would have been; that by leave of the Legislature it had entered into a contract which would otherwise have been *ultra vires*, and that no covenants could be implied in regard to it: *In re Canadian Pacific R.W. Co. and City of Toronto* (1896), 23 A.R. 250, 26 S.C.R. 682, 691; that by a "usual" covenant was meant a covenant proper or incidental to the contract, a covenant necessary to enable the contract as expressed to be carried out, but not one imposing additional burdens: *Bozon* v. *Farlow* (1816), 1 Mer. 459, at p. 473; *Henderson* v. *Hay* (1792), 3 Br.

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C.C. 631; *Browne* v. *Raban* (1808), 15 Ves. 528; *Church* v. *Brown* (1808), *ib.* 258; *Blakesley* v. *Whieldon* (1841), 1 Ha. 176, at p. 181; *Jones* v. *Jones* (1806), 12 Ves. 186, at p. 189; *Wilkins* v. *Fry* (1816), 1 Mer. 244, at p. 263; *Harnett* v. *Yeilding* (1805), 2 Sch. & L. 548, at p. 556; *Garrard* v. *Grinling* (1818), 2 Swanst. 244; that a covenant for taxes is not a usual covenant: Foa on Landlord and Tenant, 2nd ed., pp. 159, 166; that in England a tenant did not bear the land tax unless by express agreement: Boyle & Davies, Law of Rating, 2nd ed., at pp. 301, 302; Platt on Covenants, p. 211; Chambers on Landlord and Tenant, p. 414; that there are no occupiers' taxes now in this country as there are in England: R.S.O. 1897, ch. 224, sec. 2, sub-sec. 9, sec. 7, sub-sec. 7, sec. 24, sub-sec. 2, sec. 26; that sec. 190 was passed after the agreement in question here, and no argument could be based upon it: *Scragg* v. *Corporation of City of London* (1868-70), 26 U.C.R. 263, 28 U.C.R. 457; that in this country taxes are on the fee, and in absence of special agreement a tenant may deduct them from the rent: R.S.O. 1897, ch. 224, sec. 26; *In re Maddy's Estate, Maddy* v. *Maddy* (1901), 2 Ch. 820; that for the city to sell the railway company out for non-payment of taxes would be a clear infringment of their right to protection in respect to quiet enjoyment; that no covenant to repair should have been inserted, nor for re-entry on non-payment of the rent; that the railway company should not be liable for rent until the time when the title was accepted, which was not till May, 1898; that an agreement confirmed by statute overrides any general law, and here it did not call for taxes: *Canadian Pacific R.W. Co.* v. *Corporation of City of Toronto*, Ferguson, J., March 2, 1897, unreported; *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1900] 2 Ch. 352, [1901] 2 Ch. 37. They also referred to *In re Canadian Pacific R.W. Co. and City of Toronto* (1896), 23 A.R. 250, at p. 254; *Canadian Pacific Railway Co.* v. *City of Toronto* (1902), 1 O.W.R. 255; *Telford* v. *Metropolitan Board of Works* (1872), L.R. 13 Eq. 574, 594; *Ashworth* v. *Munn* (1878), 47 L.J. Ch. 747; *People* v. *Sturtevant* (1853), 9 N.Y. 263.

C. Robinson, K.C., and *J. S. Fullerton*, K.C., for the City of Toronto, contended that R.S.O. 1897, ch. 224, sec. 26, had no

application to a case where taxes could not be collected from the landlord: *Carson* v. *Veitch* (1885), 9 O.R. 706; that it would have been better to have given the property rent free than at the present rent with an exemption from taxes; that there was nothing particular or unique about that part of the agreement whereby the city agreed to lease the particular land in question to the railway company: *In re Canadian Pacific R.W. Co. and City of Toronto* (1900), 27 A.R. 54, at pp. 59-60; that a covenant by the tenant to pay taxes is always put in in a long renewal lease, which shews it is a proper and usual covenant: *Bennett* v. *Womack* (1828), 7 B. & C. 627; Stroud's Law Dictionary, at p. 845, *sub voc.* "Usual;" that the city had no inherent power to exempt from taxation without the consent of the Legislature; that when an agreement has been ratified by the Legislature, it must have its legal construction independently of any verbal stipulation between the parties; that the English land tax is in no way analogous to the tax in question here; that it is a charge on the land in the hands of the owner, coming from the old scutage and feudal tenure; that it does not vary from year to year, nor is it imposed from year to year; that though the railway company had a right to quiet enjoyment free from any claim by the city as property owners, they were not exempt from the liability of everyone to pay taxes: Dillon on Municipal Corporations, 4th ed., sec. 66, 739, 776; R.S.O. 1897, ch. 224, sec. 6, 7, 71 (3), 190; Cooley on Taxation, 1st ed., at pp. 3, 474; that a contract though sanctioned by the Legislature still is to be construed as the contract: *City of Kingston* v. *Kingston, Portsmouth and Cataraqui R.W. Co.* (1898), 25 A.R. 462, at p. 468; that as to the date for rent to commence, possession under the agreement was possession under the lease: *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9; *Lowther* v. *Heaver* (1888), 41 Ch. D. 248; *In re Maughan, Ex parte Monkhouse* (1885), 14 Q.B.D. 956, at p. 958; that the city was entitled to interest on the rent that should have been paid: *Fludyer* v. *Cocker* (1805), 12 Ves. 25; *Re MacPherson and The City of Toronto* (1895) 26 O.R. 558.

Armour, in reply.

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May 19. BOYD, C.:—The Canadian Pacific Railway has possession of the property in question under lease from the city "for successive terms of fifty years each during all time to come." There is an ultimate reversion in the city, but for all practical purposes and within the meaning of the Assessment Act, I think the lessee may be regarded as the "owner," and as such is liable to pay taxes without recourse to the owner in fee. That view is suggested by Sir M. E. Smith in his judgment: *Mayor and Corporation of Essenden* v. *Blackwood* (1877), 2 App. Cas. 574, at p. 583.

But again, and apart from this, while held as property of the city this place was not subject to taxation, yet when occupied by a tenant or lessee the exemption is removed, and the property so circumstanced becomes taxable: R.S.O. 1897, ch. 224, sec. 7, sub-sec. 7.

The incidence of such taxation plainly falls upon the tenant or lessee and not upon the city. It is strictly a tenant's tax, or tax payable by the tenant, and not in any event payable by the landlord as between him and the tenant.

Whether the leasehold property held by the city in fee and occupied by the railway company as tenants is to be considered as land exempt from taxation, and only the interest of the tenant assessable in respect of his beneficial occupation, or whether it be that the tax is imposed on the land in respect of the occupation by the tenant of the municipality, either way the person to pay the tax is the tenant and not the landlord, (the city).

There is no liability on this landlord to pay in respect of the occupation of this tenant, and if this position be correct, sec. 26 has no application, for that applies to taxes which can legally be recovered from the owner and no other. These are payable by the tenant, and cannot be deducted from the rent or recovered from any other source by the tenant, who is alone liable: see *Ward* v. *Const* (1830), 10 B. & C. 635; *Scragg* v. *Corporation of City of London* (1867), 26 U.C.R. 263; *Moore* v. *Hynes* (1862), 22 U.C.R. 107, at p. 117; and Assessment Act, R.S.O. 1897, ch. 224, sec. 7 (7), and 26 and 190. The meaning of sec. 26 as applicable to this case rests on the principle of English law that when a tenant is compelled, in

order to protect himself in the enjoyment of land in respect of which his rent is payable, to make payments which ought as between himself and his landlord to have been made by the latter, he is considered as having been authorized by the landlord so to apply his rent: *Graham* v. *Allsopp* (1848), 3 Exch. 186, 198. It seems to provide what would have been implied by law without such provision: see *per* Maule, J., in *Franklin* v. *Carter* (1845), 1 C.B. 750, at p. 757.

The reason of the rule and the pertinence of the statute disappear when the property is in the hands of the landlord exempt, and becomes liable to be taxed only when it is in the occupation of a tenant. The incidence of such taxation is necessarily in respect of and upon the tenant, who is alone liable.

It is also, as already mentioned, not the correct view that the statute applies to a case where the term is held in perpetuity, as in this case.

Such is the relative situation of the parties, without regard to the special agreement validated by statute, which is relied on as making a difference.

Now, by the very terms of that agreement it is not self-contained, so to speak. It contemplates and provides for the execution of a lease to carry out the contract. In itself it is silent on the matter of taxes, and to insert a provision or covenant for the payment of taxes by the occupant or tenant of the city property is not repugnant to anything contained or expressed or even implied in that validated agreement.

Some conversation was had at an early stage of negotiations between the solicitors of the two parties, but in my opinion, even if admissible, it is too vague and inconclusive to base any decision upon, either as to charging or relieving from taxes. It had reference to a phase of the transaction when arbitration was being provided for in order to fix the rent. These solicitors were not present when the rent, as now ascertained, was arrived at subsequently, and nothing was said or suggested as to taxes being included or excluded.

That being so, what is the proper result of the dealing so carried out and manifested in the concluded and validated agreement? Both parties were then aware of the public law of the Province as to the assessment of property, and it being

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the law that this property when leased by the city should become assessable in the hands of the Canadian Pacific R.W. Company, it was laid upon that corporation to provide for its being exempted if such was a *sine qua non*: see *Spencer* v. *Parry* (1835), 3 A. & Ell. 331, and *Wells* v. *Savannah* (1901), 181 U.S. 531.

The fixing of a rent payable to the city did not interfere with the right of the city in its governmental capacity and exercising its sovereign power to lay taxes upon the property no longer exempt. Taxes and rent are distinct things, and collectible by the city in different capacities, and I am not able to reach the conclusion that the imposition of the yearly taxes is a derogation from or is inconsistent with the validated contract: *Finch* v. *Gilray* (1889), 16 A.R. 484, 496-7.

I have not again to lay foundations as to what are usual covenants. I take it that the matter is concluded for me by the judgment in appeal in this litigation: see 27 A.R. 54. I read that, as laying down that *primâ facie*, a covenant to pay taxes is "usual," and that it lies upon the party objecting to shew by competent evidence that it was not so in this particular case or in this country. Herein the Canadian Pacific R.W. Company have failed to satisfy the referee, and I see no ground to vary the result. I take it to be tolerably plain that this is a proper covenant to be inserted if it be the case, as I hold, that this land is taxable, and that the person to pay the taxes is the Canadian Pacific R.W. Company as occupant or tenant, if not potentially owner.

As to the other covenants objected to, I do not think that the covenant to repair should be inserted, particularly as the words deleted by the referee are now by mutual consent to be restored, namely, that the lease is made "for the purposes of railway operations." The jurisdiction to keep up the railway to effective operation and the like rests entirely with the Railway Committee of the Privy Council, and no evidence has been given to shew that this is not sufficient to protect the city in common with the rest of the public.

So the covenant as to re-entry should be limited to non-payment of rent: *In re Anderton and Milner's Contract* (1890), 45 Ch. D. 476.

As to the scope of the covenant to pay taxes, there should be an exception in respect to all works agreed to be performed and provided by the city in the validated agreement; in respect of these no local improvement rate should be levied upon the property, for that would be inconsistent with the agreement.

As to the date from which rent is payable, I think the referee has come to a just conclusion. After the parties knew of the condition of affairs as to the progress of the work, and the state of the title, and after the Canadian Pacific R.W. Company had been in occupation of the premises in question since 1892, it was agreed in 1895 that the first term of fifty years mentioned in clause 19 should begin on January 1st, 1895. Reading that into the validated agreement of 1892, we have it thus expressed: "The rental for the first term of fifty years, beginning on the first day of January, 1895, shall be eleven thousand dollars per annum." See *In re Lander and Bagley's Contract*, [1892] 3 Ch. 41, at p. 47.

But I have serious doubts whether interest should also be charged on the annual rent owing to the peculiar circumstances of this case. The Canadian Pacific R.W. Company pays for the occupation, prior to the actual execution of the lease, by a sum equal to the rent to be expressed in the lease. There were other matters still open, such as the investigation of title, and various other things occasioned delay in the completion which would go to exonerate the Canadian Pacific R.W. Company from paying interest on the deferred rent. The delay as to the abstract and its completion rests at least as much on the city as on the Canadian Pacific R.W. Company, and until it was definitely settled that rent did run from January, 1895, I do not think that interest should be exacted from the Canadian Pacific R.W. Company.

I therefore vary the report by disallowing interest on the gales of rent, because as I regard the dealings and dilatoriness on both sides, there has been no default which should expose the company to the penalty of interest.

Nothing was said about costs. If not otherwise provided for, the costs of this appeal should be taxed to the city, less one-fifth to be deducted, as representing the points in which the Canadian Pacific R.W. Company succeeds.

A. H. F. L.

[IN THE COURT OF APPEAL].

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FOWLIE v. THE OCEAN ACCIDENT AND GUARANTEE CORPORATION, LIMITED.

Insurance—Accident Insurance—Proofs of Loss—Sufficiency of—Waiver—Death by Accident—Finding of Jury—Vagueness of.

Proofs of loss were furnished within the time limited by an accident policy, without objection being taken to their sufficiency, the refusal to pay being based on the contention that the circumstances surrounding the death of the insured brought it within a clause of the policy providing against liability where the death was by suicide, duelling, etc., or from natural causes; objection to the sufficiency of the proofs having been taken for the first time in the statement of defence delivered a couple of years afterwards :—

Held, that the proofs furnished were sufficient; but, in any event, objection to their sufficiency, or the right to call for further proofs, had been waived.

The insured was found dead on the track of a railway having been run over by a train. He was seen by the engineer lying on the track before the train struck him. Shots were heard shortly before this, and a pistol was found near the place. In the cap of the deceased were two holes which might have been caused by pistol bullets.

By the policy the death was required to be by accidental bodily injury caused by violent external means; while by sec. 152 of The Insurance Act, R.S.O. 1897, ch. 203, which is to be read with the policy, "accident" is defined as any bodily injury occasioned by external force or agency, and happening without the direct intent of the person injured, or happening as the direct result of his intentional act, such act not amounting to violent or negligent exposure to unnecessary danger. The jury found that there was no evidence to satisfy them that the deceased came to his death by his own hand, but that he came to his death by external injury unknown to them :—

Held, that the finding was too vague to be construed as a finding of accidental death, and a new trial was directed.

ACTION tried before BOYD, C., and a jury at Barrie on 22nd September, 1900.

Lynch-Staunton, K.C., and *John J. Stephens*, for the plaintiff.
L. G. McCarthy, for the defendants.

The action was brought, on an accident policy, by the widow of Albert Fowlie, to recover the sum of $2000.

The policy was dated the 2nd November, 1897, taken out by the deceased in the defendants' corporation, and was to be in force for twelve calendar months from its date, or from year to year so long as the policy was kept in force. It provided that "If the assured shall during the said term, or during the continuance of this policy by the renewal, sustain any accidental bodily injury caused by violence, external and visible means," the corporation will pay

(1) the maximum sum of $4000 if such injury is sustained while travelling in a passenger steamer or steamboat, or in any steam, cable, or electric passenger railway conveyance, and such injury shall within ninety days from the date of the accident be the actual and direct cause of the assured's death. (2) The sum of $2000 if the injury so sustained causes the loss of an arm, leg or eye. (3) The sum of $2000 if such injury (being caused by an accident other than those referred to in 1 and 2) shall, within such ninety days as aforesaid, be the actual and direct cause of the death of the assured, etc.

It was expressly provided—Clause B (2)—that the policy was not to extend "To disappearance or to death or injury of the assured by suicide or attempted suicide, . . . whether felonious or not, or caused by his intoxication, or while under the influence of drink or drugs, or insanity or by duelling, fighting, or other breach of the law by him . . . or while committing a breach of the by-law of any railway, shipping, or other passenger-carrying company . . . or wholly or in part arising from natural diseases or some infirmity of which the insured is cognizant and which is not disclosed to the corporation . . . and death therefrom ensues within ninety days from the date of the accident; nor does this policy extend to the death or injury of the assured arising wholly or in part from or in consequence of illness or disease, other than those covered by this policy, although such death or injury may have been accelerated by accident."

It was also provided that "Notice of the accident with full particulars must be given to the corporation at their head office for Canada in Montreal, . . . within twenty-one days from its occurrence, and in default thereof, unless the delay is explained to the satisfaction of the corporation, no claim in respect of that accident will be admitted. Such notice must be given to the corporation within three calendar months after the occurrence of the accident or illness; and in default of such notice within three months as aforesaid, and of such proof (to be furnished within thirteen months at the cost of the assured or his legal personal representative) of the death, . . . as the corporation shall require, all claims based thereon shall be forfeited to the corporation."

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"Notices and information required to be given to the corporation must be in writing, and left or sent by post to the head office for Canada in Montreal."

The evidence shewed that on the 3rd June, 1898, the insured, who lived at Orillia, purchased a return ticket to Gravenhurst, about twenty-six miles distant, telephoning his son that he had to go there on business. He left Orillia by the train, which passed Orillia at ten o'clock at night, and arrived at Gravenhurst at ten minutes to twelve o'clock. He got off the train there at the station, and then took the road leading to the town. On the following morning, between five and six o'clock, as the train coming from the north was between Gravenhurst and Severn Bridge, and not far from the latter station, the train being due at Severn Bridge station at 5.40—this station being eleven miles from Gravenhurst and on the way to Orillia—the engineer and those on board the engine saw the body of a man lying on the track between the rails. He was facing south, with his back to the engine, lying on his side with his arms stretched out, one of his arms being over the rail, and the right side of his head on the west rail, looking apparently as though he were asleep or unconscious, but the witnesses were unable to say whether such was the fact. There was a cutting through the rock, and a curve, and as the engine came round the curve the body was first seen about fifty yards distant. The engineer immediately whistled and applied the brake. The whistle and the putting on brakes, the latter of which caused a deep grating sound, had no apparent effect in rousing the deceased if he were asleep, which the witnesses thought would have been the case had he been in that condition. The train was unable to stop before reaching him, and consequently passed over him, mangling the body, cutting off the head and the arms.

A witness, who lived in the vicinity, stated that shortly before the time the train must have reached where the deceased was, he heard pistol shots fired, some four shots, and it was proved that the deceased's cap had two holes in it, which might be caused by bullets from a pistol; while near the fence, enclosing the track, a pistol was found, there being a mark on the fence close to where it was, as if it had been thrown and

had struck the fence, and had dropped down where it was. It was also proved that the deceased's hat was on his head when seen by those on the engine.

A constable, who had gone to the place after hearing of the accident, and had gone back to his house to get something to cover the body with, stated that on his returning he met a man, known to be of notoriously bad character, coming from the scene of the accident. This man asked him how did he know but that the deceased was not brought there—how did he know but that the man was murdered and brought there. At the time of the trial this man was serving a term of two years in the Kingston Penitentiary for stabbing and had been previously convicted in another stabbing case, and it appeared that he had made threats against the deceased. It also appeared that on the day prior to his leaving for Gravenhurst the deceased had a considerable sum of money with him, and when found had only a small amount. Near the track where the deceased was found there was a thick wood in which a man might conceal himself.

No by-law or regulation of the railway company was put in to shew that it was unlawful for the plaintiff to be on the track, while there was evidence to shew that the place where the deceased was found was a place where the railway people permitted the public to use as a short cut or crossing to the village.

On the 6th June, 1898, two days after the death of the deceased, the deceased's brother, his widow and son, went, on behalf of the plaintiff, to the local agent of the defendants at Orillia, where deceased before his death resided, and procured him to send the following notice of the death of the deceased to the corporation at its head office for Canada in Montreal:

"Orillia, Ont., June 6th, 1898.

The Manager,
Ocean Acc. and Guar. Co.,
Montreal.

Dear Sir,—

We regret to have to notify you of the accidental death of assured under policy 53439, Albert Fowlie, which occurred on the 4th inst. on railway track near Severn

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Bridge. Assured seems to have been walking to or from station when he was overtaken by train. Kindly send claim papers in this case as soon as possible.

Yours truly,

J. M. Watson."

The general managers of the company sent the following reply:

"Montreal, June 7th, 1898.

J. M. Watson, Esq.,
Orillia, Ont.

Dear Sir,—

We are in receipt of your favour of the 6th inst. advising us of fatal accident under policy No. 53439. We enclose fatal death claim forms to be executed in duplicate, also report form of accident for you to complete, and four witness report forms, which we would ask you to have completed by any person who may have witnessed the accident. We would ask you to be very careful in obtaining fullest information possible.

Yours truly,

Rolland, Lyman and Burnett,
General Managers."

The fatal death claim forms consisted of "Declaration of an eye-witness to the accident, with statutory declaration appended;" "Attending physician's statement, with statutory declaration appended;" "Questions to be answered by claimant;" "Affidavit of claimant;" Certificate of coroner;" "Certificate of clergyman or well-known person;" and "Certificate of undertaker."

The questions to be answered by the claimant were answered by her, and she made the affidavit required to be made by her; the certificate of the coroner was filled up and signed by him, as also was the certificate of a clergyman and the certificate of the undertaker, all in duplicate, and were returned to the company at once.

The declaration of an eye-witness to the accident, with the statutory declaration appended thereto; and certificate by attending physician, with the statutory declaration appended thereto, were not answered.

On December 17th. 1898, the general managers, in answer to a letter from the plaintiff, wrote to her as follows: "Your esteemed favour of the 10th inst. is duly received and we note your remarks with regard to the insurance of the late Mr. R. Fowlie, and beg to state that our principal reason for not paying any insurance in connection with this matter is that under Clause B (2) of the contract, in view of the circumstances surrounding Mr. Fowlie's death, this corporation does not consider itself liable for the insurance."

Objection to the sufficiency of the proofs was first taken in the statement of defence delivered on the 12th September, 1900, the action having been commenced on the 3rd May, 1899, and the statement of claim delivered on 1st September, 1900.

A nonsuit was moved for on the ground that there was no proof of any notice to the company of the occurrence of the accident or of the death, which by the terms of the contract should be proved to the satisfaction of the company; that the onus of proving the death was on the plaintiff, which she had failed to do, and also that the deceased was on the railway track contrary to the express statutory provisions relating thereto.

The Chancellor reserved his decision on the question of the nonsuit, and, subject thereto, allowed the case to go to the jury.

The jury found as follows: "We as jurors can find no evidence to satisfy us that this man came to his death by his own hand; but that he came to his death by external injuries unknown to us."

The Chancellor subsequently delivered the following judgment:—

April 24. BOYD, C.:—The jury have on the evidence found that there is nothing to shew that the deceased came to his death by his own hand, but that he came to his death through external injuries unknown to the jury. That excludes the supposition that he was killed by the locomotive, and reduces the matter to the third cause suggested by the coroner's jury, viz., that his death was by the hand of another.

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Proof papers were put in shewing death by accident, in the belief of the widow and claimant, that it was not through suicide; and the finding of the coroner's jury that the death of the insured was from revolver shots by his own hand or by the hand of another, or by the running over him of the G.T.R. train. Nothing was kept back that was within the knowledge of the plaintiff. No objection was made as to the proof of death furnished and received by the company about the middle of June, 1898.

The reason assigned for non-payment in the defendants' letter of 17th December, 1898, was that under Clause B (2) of contract, and in view of the circumstances surrounding the death, the company did not hold themselves liable for the insurance.

Clause B (2) reads as follows:—[The Chancellor here set out the clause *ante* p. 147.]

The defences on the record are: 1. Suicide (which the jury negative). 2. Illness or disease other than that covered by the policy (of which no evidence). 3. That the deceased was needlessly, carelessly, and wilfully walking on the track, and was killed by his own gross negligence (of which no proof given). 4. That he was unlawfully in a place where he was committing a breach of the instructions, regulations, and by-laws of the railway company when he was struck by the train.

Clause B (2) provides that the policy does not extend to a case of injury while the assured is committing "a breach of the by-laws of any railway." No by-laws of the railway were proved, and the evidence was rather in favour of the public being permitted to be at the place on the track where the body was found.

What was left uncertain as to the cause of the accident has now been ascertained by the verdict of the jury—it was the case of external accident, for which the assured was not responsible, and not proved to be under circumstances which ousted the incumbency of the policy.

The policy is one covering accident under the terms of the statute, R.S.O. 1897, ch. 203, sec. 152. That term "accident" includes any bodily injury occasioned by external force or agency happening without the direct intent of the person

injured, or happening as the indirect result of his intentional act, such act not amounting to voluntary or negligent exposure to unnecessary danger.

The death appears to have been the result of violence from the hand of another, and is not connected with any voluntary or negligent exposure on the part of the deceased, so far as disclosed by the evidence. How he came to be near Severn Bridge at early morning, and how his body came to be lying on the track, and, as the jury must have found, really lifeless, is yet involved in mystery; but the usual presumption in favour of fair dealing and lawful conduct, and the ordinary instincts of self-preservation, must cast the onus on the defendants to shew wherein as to any of these matters there was a failure on the part of the deceased: *Wright* v. *Sun Mutual Life Ins. Co.* (1878), 29 C.P. 221, and *Anthony* v. *Mercantile Mutual Accident Association* (1894), 162 Mass. 394.

Had the deceased been a living man when first descried by the railway officials, and had he been killed by the impact of the train, then the rule in *Neill* v. *Travellers' Ins. Co.* (1885), 12 S.C.R. 55, would go to preclude recovery. But as the jury inferred from the evidence (and rightly, I think), the body was lifeless before it was shattered by the train.

It is further argued that the plaintiff should not recover because the proofs of death sent into the company are insufficient. The cases cited do not assist this contention. *Home Life Association* v. *Randall* (1899), 30 S.C.R. 97, was that recovery could not be had under the terms of the policy unless satisfactory proof of a valid claim had been sent to the company ninety days before the action was brought. *Accident Insurance Co.* v. *Young* (1891), 20 S.C.R. 283, was decided on the ground that immediate notice of claim was, by the policy, to be given as a condition precedent, and that a delay of thirty-nine days after the accident was a breach of the condition.

The policy requires that notice of the accident, with full particulars, was to be given within twenty-one days from its occurrence, and further, that such notice must be given within three calendar months of the occurrence; and in default of such notice and of such proof of the death as the company shall

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require, all claims shall be forfeited to the company. Now, this is not made a condition precedent, and it is too vague to be enforced as such in the circumstances of this case.

Full particulars were given promptly to the extent of the knowledge of the surviving relative of the deceased, and such proof as she had was also promptly given, and more than was supplied was not required by the company prior to action begun.

As pointed out in Court, in *Accident Insurance Co.* v. *Young*, failure to give notice within the time limited stands on a different footing from failure to give notice in due form. The latter defect may be remedied by a new and more accurate form, but the former is irremediable if not waived afterwards.

Now, here the notice of the death and its particulars are given in due time, and is not complained of, and the further notice introducing proofs of loss and further particulars was not called for by the company. Ample information has been given upon and by means of the trial to enable the jury to ascertain that which was left undetermined by the coroner's jury, and to make it manifest that the claim and action were well founded.

It was perhaps not possible for the plaintiff to procure such further evidence (beyond what was in the proofs) during the period limited by the conditions, and the Court will not so construe the condition as to impose a burden on the assured or the claimant which they may be wholly unable to undertake: *per* Wightman, J., in *Braunstein* v. *Accidental Death Ins. Co.* (1861), 1 B. & S. 782, at p. 795.

Judgment should be entered for $2000, and interest from date of the writ and notice of action, in favour of the plaintiff.

From this judgment the defendants appealed to the Court of Appeal.

On November 6th, 1901, the appeal was argued before ARMOUR, C.J.O., MACLENNAN, MOSS, and LISTER, JJ.A.

Hamilton Cassels and *R. S. Cassels*, for the appellants. No proper proofs of loss were furnished. The proofs of loss put in did not comply with the requirements of the policy: *Home*

Life Association v. *Randall*, 30 S.C.R. 97; *Accident Ins. Co. of North America* v. *Young*, 20 S.C.R. 280; *Employers' Liability Assurance Corporation* v. *Taylor* (1898), 29 S.C.R. 104. The learned Judge should have nonsuited the plaintiff at the close of the case; at all events, he should have done so at the close of the whole case. The plaintiff failed to shew that the death of the assured was by accident. The policy requires it to be accidental bodily injury caused by violent external and visible means, and sec. 152 of the Ontario Insurance Act, R.S.O. 1897, ch. 203, which must be read in connection with the policy, defines the word "accident," namely, a bodily injury caused by external force or agency, and either happening without the direct intent of the person insured, or happening by the indirect result of his intentional act, such act not amounting to violence or negligent exposure to unnecessary danger. The law presumes, in the absence of evidence to the contrary, that death is attributable to natural causes, and the onus is on the plaintiff to shew it was accidental: *Montreal Rolling Mills Co.* v. *Corcoran* (1896), 26 S.C.R. 595. The plaintiff has failed to establish this. The mere fact of the insured being on the track and run over by the train is not sufficient. The evidence tends to shew that death was by suicide, which is expressly excepted from the operation of the policy. The insured was also committing a breach of sec. 273 of the Railway Act, 51 Vict. ch. 59 (D), in being on the railway track. This is also expressly excepted from the policy. The plaintiff is also excluded from the recovery by reason of the assured having exposed himself to unnecessary danger by walking on the track: *Neill* v. *Travellers' Ins. Co.* (1880), 31 C.P. 394; (1882), 7 A.R. 570; 12 S.C.R. 55. There is nothing to justify a finding of murder. No judgment can be entered on the finding of the jury. It is too indefinite. It does not shew that the death was by accident; it merely negatives death by suicide.

Lynch-Staunton, for the respondents. Proofs of loss were duly furnished. At all events, there was a waiver of any other or further proofs. The company accepted the proof furnished, and made no demand for further proofs, merely denying liability; this dispensed with the furnishing of further proofs: *Wright* v. *Sun Mutual Life Ins. Co.*, 29 C.P.

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221; *Anthony* v. *Mercantile Mutual Accident Association*, 162 Mass. 394; *Braunstein* v. *Accidental Death Ins. Co.*, 1 B. & S. 782, at p. 795; *Travellers' Ins. Co.* v. *Edwards* (1887), 122 U.S.R. 457; *Morrow* v. *Lancashire Ins. Co.* (1899), 26 A.R. 173; May on Insurance, 4th ed., secs. 465, 469. The giving of notice of death is not a condition precedent to recovery: *Shera* v. *Ocean Accident and Guarantee Corporation* (1900), 32 O.R. 411. The evidence shews that the insured came to his death by accident through violent external means, and the jury have so found. The mere fact that the insured was on the track and was run over by the train is evidence of accidental death. The presumption of law is against suicide, and the jury have expressly so found. If, for instance, a man has been found drowned, drowning by accident is presumed: *Wright* v. *Sun Mutual Life Ins. Co.*, 29 C.P. 221. The insured was not infringing the law by being on the track, for the evidence shews that this is a place where the public are permitted to cross. Then as to the assured having exposed himself to unnecessary danger, there is no provision in the policy similar to that contained in *Neill* v. *Travellers' Ins. Co.*, 31 C.P. 394, prohibiting recovery in such case. There was evidence upon which the jury might properly find that the assured was murdered and put upon the track. Under all the circumstances, the judgment was properly entered for the plaintiff.

April 11. ARMOUR, C.J.O.:—I do not think that the defendants intended to set up any defence arising from the condition for arbitration contained in the policy sued on; nor, if they did, that they pleaded such defence with sufficient precision to entitle them to avail themselves of it, and no such defence was mooted at the trial, nor is it made one of the reasons of appeal, and cannot now be entertained.

It is provided by the policy that notice of the accident, with full particulars, must be given to the corporation at the head office for Canada in Montreal, within twenty-one days from its occurrence, and in default thereof, unless the delay is explained to the satisfaction of the corporation, no claim in respect of that accident will be admitted. Such notice must be given to the corporation within three calendar months after the

occurrence of the accident, and in default of such notice within three months as aforesaid, and of such proof (to be furnished within thirteen months at the cost of the assured or his legal personal representatives) of the death as the corporation shall require, all claims based thereon shall be forfeited to the corporation.

The death of the deceased occurred on the 4th of June, 1898, and on the 6th June, 1898, the deceased's brother, widow, and son went on behalf of the plaintiff to the local agent of the defendants at Orillia, where deceased before his death resided, and procured him to give notice of the death of the deceased to the corporation at its head office for Canada in Montreal, which he did by the following letter:—

[The learned Chief Justice here set out the letter of 6th June, 1898, *ante* p. 149].

To which he received the following reply:

[Setting it out, *ante* p. 150].

The fatal death claim referred to contained: "Declaration of an eye-witness to the accident, with statutory declaration appended;" "Attending physician's statement, with statutory declaration appended;" "Questions to be answered by claimant;" "Affidavit of claimant;" "Certificate of coroner;" "Certificate of clergyman or well-known person;" and "Certificate of undertaker."

The declarations of an eye-witness to the accident and the statutory declaration appended thereto, and the attending physician's statement and the statutory declaration appended thereto, were not filled up, but the questions to be answered by the claimant were answered by her, and the affidavit to be made by her was made by her; the certificate of the coroner was filled up and signed by him, as was the certificate of a clergyman, and the certificate of the undertaker, all in duplicate, and were returned at once, and, as the evidence affords the plain inference, within twenty-one days after the death. The letter of the local agent of the defendants at Orillia of the 6th June, 1898, and the fatal death claim forms furnished by the plaintiff to the defendants constituted, in my opinion, sufficient notice, with sufficiently full particulars and proofs to satisfy the condition.

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These particulars and proofs were all that the plaintiff could, under the circumstances, furnish, and were all that could be reasonably required by the defendants: *Braunstein* v. *Accidental Death Ins. Co.*, 1 B. & S. 795.

The defendants never, until their statement of defence, raised any objection to the sufficiency of these particulars and proofs, nor did they ever require any further proof, as they were entitled to do under the terms of the condition; and on December 17th, 1898, their general managers wrote to the plaintiff as follows:—[Setting out the letter *ante* p. 151].

This letter shewed that the defendants had been made fully aware of the circumstances surrounding the deceased's death.

The defendants raising no objection to the sufficiency of the particulars and proofs, and not requiring any further proof, coupled with this letter denying their liability for the insurance, even had the particulars and proofs furnished not been sufficient, would in my opinion have amounted to a waiver of further particulars or proofs: *Travellers' Ins. Co.* v. *Edwards*, 122 U.S.R. 457; May on Insurance, 4th ed., p. 468-471; *Boyd* v. *Cedar Rapids Ins. Co.* (1886), 70 Iowa 325; *Morrow* v. *Lancashire Ins. Co.* (1898), 29 O.R. 377; 26 A.R. 173; *McCormick* v. *Royal Ins. Co.* (1894), 163 Penn. St. 184.

There was no doubt from the evidence that the death of the deceased was from bodily injury caused by violent external and visible means; but the question was whether it was accidental, and of this the plaintiff was bound to satisfy the jury.

Accident is defined by R.S.O. 1897, ch. 203, sec. 152, as "Either happening without the direct intent of the person injured, or happening as the indirect result of his intentional act, such act not amounting to voluntary or negligent exposure to unnecessary danger;" and this definition includes death by violence at the hands of another.

Three causes of death were suggested by the evidence: (1) death at the hands of another; (2) death by his own hands; and (3) death by a locomotive engine through voluntary or negligent exposure to unnecessary danger.

There was evidence which must have been submitted to the jury in support of each of these causes: *Trew* v. *Railway*

Passengers Assurance Co. (1860), 5 H. & N. 211; (1861), 6 H. & N. 839; *Fidelity and Casualty Co. of New York* v. *Weise* (1899), 182 Ill. 496; *Anthony* v. *Mercantile Mutual Assurance Association*, 162 Mass. 354.

The learned Chancellor, who tried the case, charged the jury very fully, calling their attention to all the facts proved, and no objection was made to his charge in any particular.

The following was the finding of the jury:—"We as jurors can find no evidence to satisfy us that this man came to his death by his own hands, but that he came to his death through external injuries unknown to us."

I am unable to construe this finding of the jury as one amounting to a finding that the death of the deceased was accidental within the meaning of the statute, and this the defendants were entitled to have proved before they could be held liable under their contract.

The jury do not expressly negative suicide, but only say that they could find no evidence to satisfy them of it; but, assuming this finding to negative suicide, it does not follow that the death of the deceased was accidental within the meaning of the statute, and the jury do not find it so, but only "that he came to his death through external injuries unknown to us"—a finding altogether too vague to be construed as a finding of accidental death within the meaning of the statute.

There must, therefore, be a new trial, but it must be confined to the question only whether the deceased's death was accidental within the meaning of the statute.

The costs of this appeal and of the first trial must abide the event.

MACLENNAN, J.A.:—This is an appeal from the judgment of Boyd, C., directing a judgment for plaintiff in an action tried before him with a jury. The action is upon an accident policy claiming $2000 by reason of the death of the assured. By clause A (2) of the policy the insurance is expressed to be against "accidental bodily injury caused by violent external and visible means," and by clause B (2) certain kinds of accidents are specified to which the policy does not extend. The contract is qualified by the statute, R.S.O. 1897, ch. 203, sec. 152, which must be read

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with it, and which is as follows:—"In every contract of insurance against accident, casualty, or disability, total or partial, the event insured against shall be deemed to include any bodily injury occasioned by external force or agency, and either happening without direct intent of the person injured, or happening as the indirect result of his intentional act, such act not amounting to voluntary or negligent exposure to unnecessary danger, and no term, condition, stipulation, warranty, or proviso of the contract varying the aforesaid obligation or liability of the corporation, shall as against the assured have any force or validity."

In *Neill* v. *Travellers' Ins. Co.*, 12 S.C.R. 55, it was held by Gwynne, J., that in such a case the onus lay upon the plaintiff not only to prove the happening of everything which was made a condition precedent to his right to recover, but also to prove the absence of the occurrence of anything, the occurrence of which disentitled the plaintiff to recover.

Applying that rule to this case, it was necessary for the plaintiff to prove not only that the injury of the deceased was caused by external force or agency, but also that the accident happened without the direct intent of the deceased, as, for example, an intentional self-inflicted injury, or as the indirect result of an intentional act, not amounting to voluntary or negligent exposure to unnecessary danger. The deceased had been last seen, certainly alive, at Gravenhurst at near midnight on the 3rd June, having arrived there about that time, and having alighted from the north-bound train; he was next seen lying on the railway track at Severn Bridge, eight or nine miles south of Gravenhurst, about four o'clock next morning by the driver, fireman and brakesman of the south-bound train, then approaching the station, when in spite of all efforts to stop the train he was run over and so mangled as to make it impossible to tell from the appearance of his body whether he had been alive or dead when struck by the train. The trainmen saw no sign of life before he was struck, although the whistle had been sounded as loudly as possible as soon as he was observed at a distance of about fifty yards.

Evidence was adduced suggesting both suicide and murder, and after a charge by the learned Judge, to which no objection

was made, the jury found the following verdict:—"We as jurors can find no evidence to satisfy us that this man came to his death by his own hand, but that he came to his death through external injuries unknown to us."

This verdict certainly finds the main fact proved which the plaintiff required to establish, namely, the external force or agency, and this excludes the suggestion of his having died of heart failure or fatigue from a night journey of eight or nine miles along the track. It is questioned whether it is sufficient to exclude the direct intent of the deceased. To say they find no evidence to satisfy them that he came to his death by his own hand, is not the same thing as to say he did not, which is what the plaintiff was bound to prove; but it is clear the verdict does not satisfy the onus which rested on the plaintiff of proving that the injury was not the indirect result of an intentional act amounting to voluntary exposure to unnecessary danger, as, for example, his having lain to rest or sleep upon the track.

I think there should be a new trial, and I agree that it should be confined to the question of the cause of death.

MOSS, J.A.:—Plaintiff's counsel did not contend that she could recover unless she could shew that her husband's death was from accidental bodily injury caused by violent external and visible means. They conceded that it was necessary to shew that the death was occasioned by accident, but contended that the finding of the jury was a finding of that fact. But the finding falls short of that. The jury say that they find no evidence to satisfy them that he came to his death by his own hands, thus excluding the theory of suicide upon the evidence before them. They then say that he came to his death through external injuries unknown to them. This amounts to no more than that his death was due to external injuries. But whether these injuries were due to accident or accidental bodily hurt is not found. It is quite consistent with this finding that the insured had voluntarily or negligently exposed himself to some unnecessary danger from which the injuries resulted. I do not think the finding is sufficient to entitle the plaintiff to hold the judgment in her favour, and there should be a new trial as to the cause of death.

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The defences of want of notice, defects in proofs of death, and others on the record, have been satisfactorily disposed of against the defendants, and there is no good reason why they should be further agitated.

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[IN THE COURT OF APPEAL.]

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FISHER v. BRADSHAW.

Bill of Sale—Valid Agreement to Give Mortgage—Mortgage Subsequently Given—Right to Rely on Agreement—R.S.O. 1897 ch. 148, sec. 11.

Where an agreement to give a chattel mortgage is duly made and registered under R.S.O. 1897 ch. 148, sec. 11, and subsequently a mortgage is made and registered, the giving of such mortgage whereby the legal title becomes vested in the mortgagee does not revest in the mortgagor the equitable title, which the mortgagee had by virtue of the agreement, but it continues to exist as before, and the mortgagee is enabled to rely on it where the mortgage is ineffectual for any reason.

Judgment of Boyd, C., 2 O.L.R. 128, affirmed.

THIS was an appeal in an interpleader issue from a judgment of Boyd, C., reported in 2 O.L.R. 128.

A firm of Benor & Co. borrowed $2,500 from one Reynolds, entering into an agreement with him to give a chattel mortgage, which was duly registered. The respondent herein, the plaintiff in the interpleader issue, subsequently paid off Reynolds and took a similar agreement from Benor & Co. in favour of himself. Some nine months afterwards, and three days before an execution had been placed by the appellants herein, the defendants to the issue, in the sheriff's hands, a chattel mortgage was executed in favour of the respondent in alleged fulfilment of the agreement.

The learned Chancellor found in favour of the respondent, from which the defendants appealed to the Court of Appeal.

On November 6th, 1901, the appeal was argued before ARMOUR, C.J.O., MACLENNAN, MOSS, and LISTER, JJ.A.

G. C. Gibbons, K.C., *A. J. Russell Snow*, and *L. F. Stephens*, for the appellants. The chattel mortgage was defective. The

mortgage was given to cover future advances, as well as a present indebtedness, and therefore the affidavit should have contained the particulars required by sec. 7 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1897 ch. 148. The affidavit of execution was also defective in stating that one of the mortgagors was Jemima Benor, while the name was Jemima Taylor: *Midland Loan and Savings Co.* v. *Cowieson* (1891), 20 O.R. 583. The mortgage was also defective in that it was taken by the respondent who was merely a trustee. The agreement made between the mortgagors and the respondent cannot be looked at to remedy the defective mortgage. The agreement was to give a mortgage which was to be registered, and as soon as the mortgage was executed and registered the agreement was at an end. The respondent cannot rely on the Reynolds' agreement, for it was not assigned to him until after the seizure was made, and therefore no title had passed to him at the time of seizure.

W. A. J. Bell, for the respondents. The affidavit of *bona fides* as well as the affidavit of execution must be read in connection with the mortgage itself, and when so read the statute is clearly complied with. There is a distinction between our Act and the English Act: *Smith* v. *McLean* (1892), 20 S.C.R. 355; *Morse* v. *Phinney* (1894), 22 S.C.R. 563; *Ormsby* v. *Jarvis* (1891), 22 O.R. 11; *Rogers* v. *Carroll* (1899), 30 O.R. 328. A mortgage may properly be taken in the name of a trustee: *Light* v. *Hawley* (1897), 29 O.R. 25. The agreement did not become merged in the mortgage or superseded by it. The making of the mortgage did not put an end to the agreement. They both may exist together, and the whole must be treated as one transaction. The respondent can also fall back on the agreement made with Reynolds. This was a subsisting agreement, by which, when the plaintiff paid off Reynolds, the mortgage was to be assigned, and was subsequently assigned. The judgment of the learned Judge should not be interfered with: *Ex parte Allam, re Munday* (1884), 14 Q.B.D. 43; *Hope* v. *May* (1897), 24 A.R.16; *Boldrick* v. *Ryan* (1890), 17 A.R. 253.

April 11. MACLENNAN, J.A.:—I am of opinion that the judgment ought to be affirmed, but I rest my opinion on a

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somewhat different ground from that relied upon by the Chancellor.

When the chattel mortgage, which is alleged to be defective, was taken by the respondent, he had already a perfectly good equitable charge upon the goods by virtue of his registered agreement. The chattel mortgage was intended merely to clothe him with the legal title; to vest in him the legal property in the goods. The equitable title continued as it was before; it did not, even for a moment, revest in the debtor; and, therefore, although the legal mortgage may have been ineffectual for some reason I do not see how it could impair the previous title, which was indisputably good. I think, whether the new mortgage was void between the parties to it, or only void as against creditors, the result must be the same. Therefore, even if the mortgage is void as against the execution creditor, the agreement is still valid and operative, and sufficient to protect the respondent as a security for his debt.

The appeal should be dismissed.

MOSS, J.A.:—This is an appeal by the defendants from the judgment of the Chancellor, by whom the case was tried without a jury. His opinion is reported in 2 O.L.R. 128, where the facts are succinctly stated.

It is only necessary to add for the purpose of dealing with one of the objections raised by the appellants, that the $2,500 advanced by the respondent formed part of a fund belonging to one Mary Coley, deposited in the Ontario Bank at Alliston to the joint credit of Mary Coley and the respondent, and was paid by cheque signed by Mary Coley and the respondent in favour of Reynolds, who subsequently, but after the order for the trial of the issue herein, assigned his agreement and all benefit thereunder to the respondent.

The ground most strongly urged at the trial and upon the appeal was that the chattel mortgage of the 23rd of January, 1901, being void as against creditors by reason of the defective affidavit of *bona fides*, the respondent was not entitled to rely upon the agreement of the 28th of May, 1900, to support his claim to the goods and chattels seized, and that he was there-

fore without shield against the appellants' claim under their execution.

By sec. 11 of the Bills of Sale and Chattel Mortgage Act, it it enacted that "every covenant, promise, or agreement to make, execute, or give a mortgage . . . shall be deemed to be a mortgage . . . within the meaning of the Act, and . . . the same or a true copy thereof, together with affidavits of execution and *bona fides*, shall be registered" in the same manner as a chattel mortgage, *otherwise* it shall be absolutely null and void as against creditors of the *mortgagor* and against subsequent purchasers and mortgagees in good faith for valuable consideration.

In face of this enactment it could not be contended, and it was not in fact contended, that if before the seizure no chattel mortgage had been executed, and the respondent's right rested solely upon his duly registered agreement, he could not have maintained his claim to the goods. Absolute good faith and a *bonâ fide* advance being established by the evidence and found by the learned Chancellor, I apprehend that the creditors can claim no higher rights in respect of the property covered by the agreement than could their debtor. The object of the legislation, 59 Vict. ch. 34 (O.), from which come section 11 and following sections of the Bills of Sale and Chattel Mortgage Act, was to put an end to secret agreements, and to prevent the concoction of agreements to support chattel mortgages given on the eve of assignments in insolvency, or of the placing of executions in the hands of the sheriff, and to enable creditors by searching in the proper place to ascertain the existence of any claim against the goods and chattels of their debtor. A creditor searching in the office of the clerk of the county court sees filed or registered a covenant or agreement to give a chattel mortgage. This is to him as ample information as the mortgage itself. And there is no reason why the holder of the agreement should not have the benefit of it as against an execution or other creditor to the same extent as if he held the legal property in the goods and chattels. The question in an issue like the present being whether as against the claimant the goods are subject to the execution, and the object being to try whether they were liable to be taken in execution as being

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the execution debtor's, the execution creditor suffers no prejudice or wrong from the production of an agreement which he cannot say is void as against him by reason of failure to observe any of the requirements of the Bills of Sale and Chattel Mortgage Act: *Edwards* v. *English* (1857), 7 E. & B. 564; *Shingler* v. *Holt* (1861), 7 H. & N. 65; *Black* v. *Drouillard* (1877) 28 C.P. 107. But the appellants urge that the effect of the giving and taking of the chattel mortgage was to avoid the agreement. Their contention in this respect comes to this, that although the chattel mortgage is void as against them, it must be held good for the purpose of superseding the agreement and thereby letting in the executions. The same kind of argument was presented in *Edwards* v. *English* (*supra*), but was not given effect to, and I see no good reason why effect should be given to it in this case. There is no evidence to shew any intention to give up the agreement. It appears to have been retained by the respondent, and Benor and Taylor have not claimed that they were absolutely discharged from liability under it. On the contrary, they appear to have subsequently acknowledged their continued liability by executing another mortgage in confirmation of the first. There can be no objection to the respondent, acting in good faith, holding more than one instrument or security for the goods and chattels pledged to him: *Boldrick* v. *Ryan* (1890), 17 A.R. 253.

The appellants also objected that the respondent acted as an agent in taking the security, and that the affidavits of *bona fides* made by him should have contained the statements prescribed in that case. I think, however, that it is sufficiently shewn that he was entitled to take the security to himself and to make the affidavit of indebtedness to himself as he has done. As between him and Mary Coley, he is responsible to her for the money. The latter having joined the respondent in a cheque for the money must be taken to have assented to the transaction and to the taking of the security as it was done, and that is sufficient for the creation of the relationship of debtors and creditor between Benor & Taylor and the respondent.

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I would affirm the judgment, and dismiss this appeal with costs.

ARMOUR, C.J.O., concurred.

LISTER, JJ.A., died before judgment was pronounced.

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[IN THE COURT OF APPEAL.]

MOORE v. THE J. D. MOORE CO.

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Workmen's Compensation for Injuries Act—Master and Servant—Injury to Servant—Negligence—Dangerous Machinery — Want of Guard—Factories Act, R.S.O. 1897 ch. 206, sec. 20—Liability.

The plaintiff, a boy between fourteen and fifteen years of age, was employed by the defendants in cleaning up around a machine—called a dove-tailing machine consisting of rapidly revolving knives—carrying pieces of board therefor, and on one occasion he had cleaned it. He had carried some boards and laid them down by the machine and was going for another load when he was directed by the operator to straighten them out. On his proceeding to do so, and, not observing that the machine was in motion, he put out his hand to remove some dust on it when his arm was caught in the machine and cut off. The machine was of a very dangerous character, and the knives, when revolving, had the appearance of a solid stationary cylinder. There was no guard or protection around it, and no one at the time was in actual charge of it, the operator having left it, being some four feet away looking out of a window.

The jury found that the cause of the accident was the negligence of the defendants in not having the machinery properly guarded, and the inattention of the operator, and they negatived contributory negligence on the part of the plaintiff:—

Held, that the defendants were liable.

Judgment of Street, J., at the trial reversed.

THIS was an action tried before STREET, J., and a jury at Stratford on the 13th and 15th March, 1901.

John Idington, K.C., and *J. S. Robertson*, for the plaintiff.

J. P. Mabee, K.C., and *E. W. Harding*, for the defendants.

The plaintiff, a boy between fourteen and fifteen years of age, was employed by the defendants. His duties consisted of cleaning up around a machine called a dove-tailing machine, picking up the pieces of boards—that is, cuttings—clearing up the floor, shovelling up shavings, and also in carrying boards

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to be put into the machine to be dove tailed, and on one occasion cleaning the machine itself.

On the 6th September the plaintiff was helping another lad to carry up these pieces of boards and shovelling shavings. He had carried up an armful of boards and had put them down beside the machine. He was about to go for another armful, when he was called back by one Ward, the man operating the machine, and told to pile them straight. Ward was not then by the machine but some four feet away, looking out of a window. As the plaintiff passed by the machine for the purpose of piling the boards, he thought he noticed some dust on the machine, and thinking that the machine was not in motion, he put his hand on the machine to brush off the dust, when his arm was caught by the knives of the machine, and was taken off. It appeared that when the machine was in motion the cylinder revolved so quickly as to appear as though it was not in motion.

There was a good deal of evidence given as to the nature of the accident, and as to the character of the machine, whether dangerous or not.

A motion for nonsuit was made at the close of the plaintiff's case, and also at the close of the whole case, on the ground that there was no evidence of negligence, and that the accident was caused by contributory negligence of the plaintiff.

The learned judge reserved his decision on the question of nonsuit, and submitted the following questions to the jury:—

1. Did the plaintiff put his hand in above or below the plate? Answer—Above the plate.

2. Were the knives in the machine, as far as practicable, securely guarded? Answer—No.

3. If they were not, were the defendants guilty of negligence in not having them further guarded? Answer—Yes.

4. Was the accident caused by negligence on the part of the defendants? Answer—Yes.

5. If so, in what did such negligence consist? Answer—In the machine not being properly guarded, and the inattention of Ward, the operator of the machine.

6. Could the plaintiff by using reasonable care have avoided the accident? Answer—We believe that he used reasonable care for a boy of his age.

7. If the plaintiff is entitled to damages, at what sum do you assess them? Answer—At $500.

The learned Judge subsequently delivered the following judgment:—

April 15. STREET, J.:—The employment of boys of the age of the plaintiff at the work at which this boy was employed by the defendants is not forbidden by law. The plaintiff had been warned to be careful as to where he put his hands in the factory. He had seen the machine by which he was injured when it was at rest and when it was in motion. He knew that the knives were dangerous, and he knew their position. He says that if he had taken any notice of it he could have seen that it was in motion, but that he didn't look. He says that the fact that the man in charge of it was standing a yard away from the machine, at the window, gave him the impression that it was not in motion. He had been directed to carry some short boards and lay them down near the machine; he says he had just laid them down, and was going downstairs again when the man in charge of the machine told him to come back and lay them straight, and as he passed the machine he put his hand upon it to brush off some dust on the plate, and was caught by the knives. He had no business to touch the machine; he put his hand on it designedly and not by accident. He was between fourteen and fifteen years of age, and it was not pretended that he was lacking in intelligence.

I submitted questions to the jury, reserving, however, decision upon the question of nonsuit. The jury have found that the defendants were negligent in not having the knives in the machine more securely guarded, and that the negligence which caused the accident was the lack of a guard over the knives and the inattention of the man at the machine, and that the plaintiff used reasonable care for a boy of his age.

In my opinion there was no evidence given on the part of the plaintiff of any negligence of the defendants which caused the accident.

The fact that the man in charge of the machine was looking out of the window, as the plaintiff said, or that he was intent upon his work, as he himself says, was not an act of negligence

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under the circumstances. There was plenty of evidence that the knives of the machine might have been more securely guarded, although they were sufficiently guarded for the purposes of the man working it, and were not dangerous to passers-by unless they put their hands on them; but the fact that the knives were not further guarded would not have caused injury to the plaintiff if he had not wilfully gone out of his way and put his hand upon them, he not being called upon to put his hand near them or to touch the machine at all by any real or supposed duty to his employers. It was a mere idle movement on his part, such as perhaps many men as well as boys might have indulged in as they passed near a machine without looking at it to see whether it was in motion or not.

It is plain, I think, that a man bringing about a similar accident by similar means would be told that he was himself the author of the injury he had sustained, for the reason that he was capable of knowing the danger that he ran. Here the whole evidence shewed that the plaintiff was capable of the same knowledge, and he himself told us in the box that if he had looked at the machine he would have known that it was in motion, and that it was therefore dangerous. There was, in my opinion, no evidence to submit to the jury upon this point, but to avoid the chance of another trial, I reserved the question of nonsuit and allowed the jury to pronounce upon it.

I think the case depends upon the single neat question whether, in the absence of any evidence to shew that a boy over fourteen years of age is not capable of understanding so simple a question of danger as was here presented to him, and in spite of his own evidence that he did understand it, the question of whether he did or did not understand it must nevertheless be submitted to the jury. A line must be drawn somewhere, or the question of capacity must in every case be treated as a question for the jury, and they must be asked whether a grown man, injured by his own palpable carelessness by a machine which he had no business to be near, was capable of understanding the danger he ran. Where the line, if any is to be drawn if below the age of fourteen, it is not necessary for me to discuss in the present case, as the plaintiff was above that age when the accident took place, but upon attaining that

age our statutes shew that the age of knowledge, discretion, and consent are considered to begin. Under the Factories Act, for instance, a "child" is a person under fourteen years of age, and employers are not forbidden to employ a boy over that age at any kind of work. At that age he is presumed under the Criminal Code to be possessed of full capacity to commit crimes and to give consent.

I remain, therefore, of the opinion that the plaintiff has made out no case of negligence on the part of the defendants which caused the accident, and I order that the action be dismissed with costs.

See *Roberts* v. *Taylor* (1899), 31 O.R. 10; Beven on Negligence, 2nd ed., p. 190; *Nagle* v. *Allegheny Valley R.W. Co.* (1878), 88 Pa. St. 35.

From this judgment the plaintiff appealed to the Court of Appeal.

On November 7th and 8th, 1901, the appeal was argued before ARMOUR, C.J.O., MACLENNAN, MOSS, and LISTER, JJ.A.

Idington, for the appellant. The evidence shews that the machine was of a dangerous character, and therefore should not have been left unguarded. The machine only ran for a short time each day, and, when the plaintiff saw that Ward, the operator, who had charge of the machine, had left it and had gone to the window, he might reasonably assume that the machine had been shut off and was not running. It was the duty of Ward to have warned the plaintiff that the machine was in motion and of the danger of touching it. The defendants are liable at common law: *Vickary* v. *Keith* (1878), 34 U.C.R. 212; *Grizzle* v. *Frost* (1863), 3 F. & F. 622. They are also liable under sec. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897 ch. 160, by reason of the defect in the condition or arrangement of the ways, works, machinery, etc., and of the acts and omissions on the part of Ward, the operator in charge of the machine. The amending Act of 1899, 62 Vict. (2) ch. 18, sec. 3, casts on the defendants the onus of shewing a compliance with the requisites of the Act. There was also a breach of sec. 20 of the Factory Act, in not having a dangerous machine of this character guarded:

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Campbell v. *Ord* (1873), 1 Court of Sess. Cas. (Rettie) 149; *Jewson* v. *Gatti* (1886), 2 Times L.R. 441; *Garland* v. *Corporation of Toronto* (1895),27 O.R. 154; *Tate* v. *Latham & Son*,[1897] 1 Q.B. 502; *Scriver* v. *Lowe* (1900), 32 O.R. 290; *Groves* v. *Lord Wimborne*, [1898] 2 Q.B. 402. The age of the plaintiff should. should also be taken into consideration, and this was for the jury. They are the proper judges of his intelligence. The question of negligence and contributory negligence was, under the circumstances, for the jury to determine. On the findings of the jury the plaintiff is entitled to recover.

Mabee, for the respondents. There is no evidence of negligence on the part of the defendants to submit to the jury, and at the conclusion of the evidence for the plaintiff the case should have been withdrawn from them. It was no part of the plaintiff's duty to clean the machine, and therefore he was not acting in performance of his duty in endeavouring, as he says, to remove dust from it. It is not the case of an accident occurring through a person inadvertently coming into contact with dangerous machinery; but of an accident occurring by the act of the plaintiff himself in deliberately touching the machine while in motion. Had he looked carefully at the machine he would have seen it was in motion. It is quite apparent that the plaintiff knew of the dangerons character of the machine, for he admits he was duly warned. No duty is cast upon the operator to stand by the machine to prevent persons from needlessly interfering with it. The boy was of competent age. The Factory Act states that there is to be no capacity under 14 years, and the reasonable inference is, that at 14 years there is such capacity. Then the fact of the criminal law fixing 14 years as the age in which there is capacity to commit a crime would justify the Court in holding that there was capacity here. Then as to the want of a guard, this cannot impose any liability, for it was not the absence of a guard that caused the accident, but the plaintiff's own deliberate act. No guard could be constructed which would be effective to prevent an accident of this kind unless the machine was so closed up that it would be impossible for the operator to use it. The learned Judge properly dealt with the question of contributory negligence on the undisputed facts

before him. The judgment of the learned Judge should not be interfered with: *Nagle* v. *Allegheny Valley R.W. Co.*, 88 Penn. 35; *Mangan* v. *Atterton* (1866), L.R. 1 Ex. 239; *Campbell* v. *Ord*, 1 Court of Sess. Cas., 4th ed. (Rettie), 149; *Roberts* v. *Taylor*, 31 O.R. 10.

Idington, in reply. There is no presumption of capacity at 14 years. The fact of the Factory Act prohibiting the employment of boys under the age of 14 years does not raise any presumption of capacity at 14 years, and this is borne out by the fact that by sec. 4 the Governor in Council is from time to time empowered to pass orders fixing the age of 16 in works of a dangerous character.

April 11. ARMOUR, C.J.O.:—The plaintiff, then a lad of fifteen years of age, went into the service of the defendants, and was employed by them in their factory, according to his account of it, in putting pieces of board-cuttings that were no use into the boxes, shovelling shavings, cleaning the floor, and on one occasion cleaning the machine by which he was afterwards injured.

At the time he was injured, as he stated the circumstances, one Ward, a servant of the defendants, who was in charge of the dove-tailing machine, ordered him to bring up some boards to be put through this machine; he carried up an armful of boards and laid them down beside the machine, and was going back for another armful when Ward called him back to straighten the boards; at this time Ward was not at the machine, but was standing at a window some few feet from it; as he went back to straighten the boards, passing the machine, and not seeing that it was running, he put his hand out to brush the dust off the machine, and it was caught by the knives and his arm was taken off.

The machine was a dangerous one, and was run at the rate of three thousand revolutions a minute, and when running the knives would appear like a solid cylinder.

[The learned Chief Justice then set out questions submitted to the jury, with their answers, and proceeded:]

The learned Judge at the trial thereupon gave judgment dismissing the action with costs.

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I am unable to agree with the views of the learned Judge, and think that his judgment should be reversed.

The object of the provision in the Factories Act, that in every factory all dangerous parts of machinery should, as far as practicable, be securely guarded, was for the protection not only of those operating such machinery, but also of those whose business brings them into proximity to such machinery.

The defendants neglected their duty in this respect, and were guilty of what might properly be called deliberate negligence, and this negligence was the effective cause of the injury to the plaintiff.

The question then arises, was the plaintiff guilty of such negligence as severed the causal connection between the defendants' negligence and his injury. And this was a question which must have been submitted to the jury, and could not have been withdrawn from them and determined as a question of law.

The plaintiff was passing close to this machine, as he was obliged to do in obeying the orders that were given to him; the operator was not at the machine; he did not notice that it was running, and was under the impression that it was not; he put out his hand to brush the dust off it, a service he had performed before in obedience to orders; and his hand was caught by the knives and his arm torn off.

A person may be exercising reasonable care, and in a moment of thoughtlessness, forgetfulness, or inattention, may meet with an injury caused by the deliberate negligence of another, and it cannot be said that such momentary thoughtlessness, forgetfulness, or inattention, will, as a matter of law, deprive him of his remedy for his injury caused by the deliberate negligence of the other, but it must in all such cases be a question of fact for the jury to determine.

I am unable to see upon what ground the question of contributory negligence could have been withdrawn from the jury in this case had the plaintiff been an adult, but there was still less ground for its being so withdrawn by reason of the age of the plaintiff.

A hard and fast line has been drawn in the criminal law at the age of fourteen as the limit of incompetence to commit

crime, but this rule is inapplicable to civil proceedings, and in cases of this kind the age, capacity, and experience of the infant must be taken into consideration by the jury in ascertaining what measure of reasonable care must be exacted from him: *Crocker* v. *Banks* (1888), 4 Times L.R. 324; *Fehnrich* v. *Michigan Central R.W. Co.* (1891), 87 Mich. 606: Beven on Negligence, 2nd ed., 172.

In this case the jury negatived contributory negligence on the part of the plaintiff, finding that he used reasonable care for a boy of his age.

In my opinion, the appeal should be allowed with costs, and judgment entered in the Court below for the damages assessed by the jury, with full costs.

MACLENNAN and MOSS, JJ.A., concurred.

LISTER, J.A., died before judgment was delivered.

G. F. H.

[IN THE COURT OF APPEAL.]

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May 8.

FALLIS v. THE GARTSHORE, THOMPSON PIPE AND FOUNDRY COMPANY.

Negligence—Dangerous Premises—Want of Screen or Guard.

While a teamster was delivering a load of coke on the premises of the defendants, an iron foundry company, he was struck in the eye and injured by a chip, which one of the defendants' workmen, who was cutting off the excrescences on the inside of an iron pipe for the purpose of smoothing it, had chipped off. The accident might have been avoided had there been a screen or guard, or, in the absence of such device, by the workman stopping work during the delivery of the coke :—

Held, that the defendants were liable for the injury sustained.

THIS was an action tried before MacMahon, J., and a jury at Hamilton on the 9th April, 1901.

George Lynch-Staunton, K.C., and *J. C. Gauld*, for the plaintiff.

John Crerar, K.C., and *P. D. Crerar*, for the defendants.

The action was brought to recover damages from the defendants for an injury, owing, as the plaintiff alleged, to the defective condition and arrangement of the ways, works and premises of the defendants, and to the negligence of the defendants in not providing a suitable guard, protection or enclosure for the cutting of pipes upon their premises.

The plaintiff was a teamster of the firm of A. D. Garratt & Co., who had a contract for supplying the defendants with coke. The plaintiff had been delivering coke on the defendants' premises for about four weeks, and on the 13th December, 1899, while he was delivering a load, putting it into a bin provided for it, he was struck in the eye and seriously injured. The injury was occasioned, as alleged by the plaintiff, by a chip from an iron pipe, which one of the defendants' employees, who was working with a cold chisel chipping off the rough pieces on the inside of the shoulder of the pipe, had chipped off. He was in close proximity to where the plaintiff was, viz., from fifteen to eighteen feet.

It was proved that one of these chips would fly as much as fifty feet, and with a good deal of velocity, and should one strike the eye it would be likely to cause serious injury.

The plaintiff claimed that the place should have been protected by a guard or screen or some kind of protection to keep the chips from flying, or that the necessity for such guard or screen could have been avoided if the man had stopped work during the time the coke was being delivered, viz., from ten to twenty minutes.

For the defendants it was contended that there was no evidence to shew that the plaintiff was struck by the chip in question; that the evidence shewed that the man was working with his back to the plaintiff, and the chips would therefore fly off into the pipe; and that the only way it could have struck him was by its rebounding, and that this was impossible; and that a guard or screen was impracticable.

The learned Judge left the following questions to the jury:

1. What caused the injury to Fallis's eye? Answer—The chip of iron from pipe.

2. If you find it was caused by a chip of iron from the pipe, did it result from the dangerous condition of the defendants' premises? Answer—(1), yes; (2), no.

3. If you find the premises were dangerous, what would have obviated such dangerous condition? Answer—Screen, movable or stationary.

4. If on the answers you make to the questions, Fallis is entitled to recover, at what sum do you assess the damages? Answer—Agree, damages $400.

Upon the findings of the jury, judgment was entered for the plaintiff for the $400 and costs.

From this judgment the defendants appealed to the Court of Appeal.

On November 8th, 1901, the appeal was argued before ARMOUR, C.J.O., MACLENNAN, MOSS, and LISTER, JJ.A.

Crerar, and *P. D. Crerar*, for the appellants. No negligence on the part of the defendants was proved. The plaintiff could not say that the accident was caused by a chip from the pipe. It was at most a mere matter of conjecture.

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It was just as likely to have occurred by a piece of charcoal getting into his eye while he was unloading his cart. The onus was on the plaintiff to shew the cause of the accident, and he failed to do so. The evidence is that the accident could not have occurred from a chip from the pipe. The man was working with his back to the plaintiff, and the course of the chips was from him and into the pipe, which was in the opposite direction from that in which the plaintiff was. In order to get over this difficulty, the plaintiff set up that the chip rebounded over the workman's head and then struck the plaintiff. This is so opposed to what would be possible, that no effect should be given to it. The evidence also shewed that no suitable guard could have been placed there, and it would be impossible for the defendants to carry on their business if their men were obliged to stop work whenever anyone came into the yard. Moreover, the defendants were carrying on their business as it had always been carried on, and as all businesses of a like character were carried on, and no notice or knowledge is brought home to them that chips could so rebound so as to cause injury, and it would therefore be most unreasonable under the circumstances to impose any liability on them: *Crafter* v. *Metropolitan R.W. Co.* (1866), L.R. 1 C.P. 300; *Pearson* v. *Cox* (1877), 2 C.P.D. 369; *Lay* v. *Midland R.W. Co.* (1874), 30 L.T.N.S. 529, 531.

J. W. Nesbitt, K.C., for the respondent. The evidence shewed that the plaintiff was injured by a flying particle, and that particles were flying in the direction of the plaintiff from the pipe which the workman was working at, and the plaintiff positively swears that it was a particle from the pipe that struck him. There being evidence on this head to go to the jury, their finding in favour of the plaintiff should not be disturbed. The plaintiff was there by invitation of the defendants, and it was their duty to see that in carrying on work on their premises it was so carried on as not to cause injury to persons lawfully there. The defendants could have prevented the accident from occurring by putting up a screen or guard, which would have prevented the chips from flying in the direction of the plaintiff. If, however, they did not choose to go to the expense of having a screen or guard, the man might

have stopped work during the short time that the coke was being delivered. It is no answer, after an accident has occurred and a person has been seriously injured, to say that they did not anticipate injury. It is their duty to see that their premises were so managed that accidents would not occur. There was liability at common law and also under sec. 4 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160; Beven on Negligence, 2nd ed., p. 108; *Lax* v. *Corporation of Darlington* (1879), L.R. 5 Ex. 28.

May 8. ARMOUR, C.J.O.:—This case is governed by the principles of law laid down in *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274; (1867), L.R. 2 C.P. 311, and other kindred cases.

The plaintiff was the servant of A. D. Garratt & Co., who had contracted to deliver coke to the defendants, who were ironfounders. In fulfilment of this contract, the plaintiff went with a horse and cart, loaded with coke, to the defendants' shed, to a bin in which the coke was to be placed, backed the cart up to the bin, and was about to proceed to unload the coke when he was struck in the eye by an iron chip.

From fifteen to eighteen feet from where he stood was a skidway on which iron pipes were placed after they were cast, and a workman of the defendants was engaged with a cold chisel and hammer removing excrescences on the inside of the shoulders of these pipes, and it was shewn that the chips from this work would fly as much as fifty feet and with a good deal of velocity, and would likely injure a person if one should chance to hit him in the eye.

It was disputed at the trial that a chip from this work could have flown in the direction of the plaintiff so as to have hit him in the eye, but this was determined by the finding of the jury that it did.

The jury also found that the injury resulted from the dangerous condition of the defendants' premises, and that a screen, movable or stationary, would have obviated the danger.

I do not think that we can interfere with the findings of the jury, supported as they were by evidence.

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It was contended that it was a very unusual accident, and that it was not customary when such work was done to use any screen or hoarding to guard against danger, still it was well known to the defendants that from this work chips would fly with a good deal of velocity, and although if they hit a person in any other place but the eye they would work no injury, yet if they did, it was likely they would do so.

It was contended, also, that a screen would be in the way, having regard to the size of the shed, and would prevent the business of the defendants from being conveniently carried on; but there does not appear any reason why, in the absence of a screen, this particular work should have been carried on when any person there, by the invitation of the defendants, was in proximity to it.

Nor was the fact that the accident to the plaintiff one which was unlikely to occur, a reason why it should not have been guarded against, for it was known that it was one which might occur.

I cannot say that the jury acted unreasonably under the circumstances in holding the defendants answerable for the plaintiff's injury.

It was said in *Indermaur* v. *Dames*, L.R. 2 C.P. 311, at p. 312, if a "person on lawful business, in the course of fulfilling a contract in which both the plaintiff and the defendants have an interest," that "with respect to such a visitor at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, when there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding, or otherwise, and whether there was such contributory negligence in the sufferer, must be determined by a jury as a matter of fact."

In my opinion, the appeal should be dismissed with costs.

MOSS, J.A.:—I have come to the conclusion, though, I confess, not without some hesitation, that the verdict and judgment ought not to be disturbed. This is not a case between employee

and employer. It is that of a person entering the defendants' premises on lawful business in the course of fulfilling a contract in which both he and defendants had an interest. While on the defendants' premises, and lawfully engaged in transacting the business which brought him there, the plaintiff was injured by an iron chip, struck from a cast iron pipe by a workman in the defendants' employ, hitting him in the eye. The iron pipe lay, with others, on a skid in an open shed, seventeen or eighteen feet from a bin into which the plaintiff was about to unload some coke which he had brought in a coal cart or waggon. There was evidence that at times when the defendants' workmen were engaged in striking from the inner surfaces of the iron pipes the knobs or bulbs which form there in the process of casting, chips would fly to a very considerable distance in every direction; and that, on occasions, they had reached the place where the plaintiff stood with his cart on the day he was struck. There was also evidence that the defendants knew of the tendency of the chips to fly in this manner. The chips were of different sizes, some being of the size of a five cent coin, and the one which struck the plaintiff was said by him to have been of that size. The danger of injury, except from a blow in the eye, was probably not very great, and that consideration accounts, in all probability, for it not being deemed necessary to provide any guard, or use any other precaution, against such an accident. But where such missiles were flying about, there was obviously a danger to a person like the plaintiff, not frequently upon the premises and not likely to be on his guard. To him, and others like him, the defendants owed a duty to be careful to guard them from injury.

There was evidence upon which the jury might find as they did that the injury to the plaintiff was caused by a chip from the pipe, and that it resulted from the dangerous condition of the defendants' premises. The result of their findings is that as regards this plaintiff the premises were dangerous, and the defendants were negligent. It may be that the evidence would have warranted a verdict in the defendants' favour; but upon the essential questions there was evidence to be submitted to the jury, and it was for them to determine the fact. The case

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was submitted to them upon a charge which was certainly not unfavourable to the defendants, and of which no complaint was made.

The appeal should be dismissed.

MACLENNAN, J.A., concurred.

LISTER, J.A., died before judgment was delivered.

G. F. H.

[DIVISIONAL COURT.]

D. C.
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June 11.
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May 8.

BAILEY v. GILLIES ET AL.

Contract—Parol contract to drive logs—Statute of Frauds, sec. 4.

M., who had agreed with the defendants, and a number of other lumber manufacturers, to drive down their logs for them, the defendants' contract being a parol one, arranged with the plaintiff to act for him, the obligation to drive the defendants' logs to continue to a named date for which the plaintiff was to be paid a specified sum, and if M. did not then arrive and take over the drive, the plaintiff was to continue it and to be paid a specified sum per day for himself and those employed by him. M. did not arrive and the drive was continued by the plaintiff. Subsequently, M. having some difficulty in paying his men, a parol agreement was entered into between him and the defendants, whereby, in consideration of his assigning over to them the amounts due him by the defendants and other manufacturers, the defendants undertook to continue the drive and to pay the existing as well as the indebtedness thereafter to be incurred, the plaintiff being instructed and agreeing to continue the drive on these terms :—

Held, by ROBERTSON, J., that there was a new contract founded on new and substantial consideration so that the fourth section of the Statute of Frauds did not apply.

On appeal to the Divisional Court the judgment was affirmed, but on the grounds (1) of novation, or (2) that even if M.'s indebtedness still continued, the moneys coming to him having been assigned to the defendants upon their express promise to pay the indebtedness thereout, and the plaintiff having continued the drive on such terms, there was a binding obligation to pay him, and that, in either view, the Statute of Frauds did not apply.

THIS was an action tried before ROBERTSON, J., without a jury, at the Pembroke assizes on the 9th of May, 1901.

T. W. McGarry, for plaintiff.

J. H. Burritt, for defendants.

The facts are stated in the judgment of the Judge at the trial.

June 11. ROBERTSON, J.:—The action is brought to recover a debt for work and labour in driving sawlogs down the Madawaska River for one Joseph McCrae, who was under contract with defendants, lumber manufacturers, and several other lumber manufacturers, for that purpose; and also for the same description of work for defendants, apart from what was due by McCrae to the plaintiff.

The pleadings are not in a satisfactory shape, but as all the facts were fully gone into at the trial, both *pro* and *con*, I will allow the plaintiff to amend his statement of claim to suit the facts as I find them to be on the evidence. I cannot see that defendants need amend their statement of defence. The case was not presented in a clear and distinct manner, the evidence being much involved and somewhat contradictory, but on the whole evidence, I find the following to be the facts:—

In the spring of 1899 one Joseph McCrea entered into a verbal contract with Gillies Bros. (the defendants), and also with J. R. Booth, James Bailey, The Rathbun Company, and, after 12th June, 1899, with Caldwell & McKay and The Rideau Lumber Company—all of whom were the owners of a large quantity of sawlogs then lying in the Madawaska river and lake of that name. Each of these owners had a separate contract with McCrea, but their logs were all together in the water, and were to be driven down together. The amount agreed to be paid by defendants to McCrea for driving their logs was $2000. The amount to be paid by each of the other owners did not come out in evidence. The whole drive was to be taken down to Arnprior.

McCrea employed a number of men to assist in taking down the drive, nearly all by the day; but with the plaintiff he entered into a verbal contract to drive the logs from a particular point, where they were on 29th May until the 10th July, for which McCrea was to pay $100. There had been similar contracts in previous years between McCrea and the plaintiff.

On 10th July McCrae, it was understood, would continue the drive by other means than by the plaintiff, but, as was done

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in former years, should McCrae not be there when the plaintiff finished his part of the drive, there was an understanding that he was to keep the drive going at $1.50 per day for himself and each man he employed until McCrae came. There were obstructions and difficulties in getting the logs down: sometimes the water was too low, other times head winds would interfere, and sometimes the Government Inspector of Slides would stop the drive; so that there was danger that the logs would not reach their destination before the weather got too cold.

McCrae did not appear on 10th July, as was intended he should, but the plaintiff, as he had formerly done, kept the drive moving on, relying on being paid as usual by McCrae. This continued until about 17th or 18th September; but previous to this rumours having reached defendants that there was danger of the drive not being got down, owing to the men quitting work for want of being paid, defendants, on 21st August, 1899, wrote a letter to McCrae, as follows:—

"Dear Sir,

J. B. Kerr intends going to see how the drive you are bringing is, and we have instructed him to have it brought out if possible. If your men are leaving on account of being afraid of their pay, we, for our part, would be willing to share the expense of any extra men that will be necessary to bring it. But we want it understood that you will let Kerr know how much is still owing the men, and that the amount that is still in our hands on the contract will go towards paying the men. We are willing to enter into such an arrangement providing the others concerned are also satisfied to pay in proportion to the amount of logs they have, each to pay also only in proportion to the distance the drive has to be brought. We presume the others concerned are Caldwell, McKay, Rathbun, Bailey, Rideau Lumber Co., and ourselves. I do not know how Booth & McLaughlin will look upon it, but the drive will have to come out if possible.

Yours truly,

(Sgd.) The Gillies Bros. Co., Limited—J. G."

In answer to this letter, I find that McCrae sent a statement of his liabilities to the men then on the drive, so far as he

knew, but he kept no copy of it, and defendants have not produced it. Both McCrae and defendant John Gillies, who was examined at the trial, say nothing came of that letter; but I find that the defendants were anxious about the drive and apprehended from reports sent to them that the drive would not be got through; and afterwards, on 17th or 18th September, a meeting took place between McCrae and John Gillies, there having been in the meantime, according to Mr. Gillies' evidence, negotiations or "dealings," as he called it, between them in the matter. When on 18th September they met, talked the matter over again, and in Mr. Gillies' own words, "came to an understanding in this way: that McCrae was to assign to me all balances in the hands of the lumbermen for whom he was driving. I was to take over the drive, pay the men that were then on the drive or *those that might be brought on*, both for the time they had worked for McCrae, provided they remained on until the drive was through or we discharged them."

Then he says, in answer to a question from his counsel, Mr. Burritt: "Did you mention what men? Answer—No, I did not mention definitely what men; for I did not know them. Well, the men on the lake and the men on the sweep. Question —You mentioned on the head of the lake and on the sweep? Answer—Yes. I assumed the liabilities of those men. I guaranteed to see that all those men were paid." Then Mr. Gillies says: "He saw McCrae again that day, after the bargain was concluded, and they had a little conversation walking down the street, and in the course of the conversation this matter of William Bailey (the plaintiff) came up, and McCrae told him that he had entered into a contract with Mr. Bailey for $100, *as I understood it, to put that drive through*, and at the same time he told me that there had been $50 paid on that so far, and all that was due to Bailey on that contract was $50, and I agreed to pay the $50." Then he says: "I took the drive over and kept it coming until such times as it was getting too late in the fall, and we could not get it down sometime in October." Then he says: "The time that I made the bargain with Mr. McCrae I authorized James Bailey (not the plaintiff) to go

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upon the drive and arrange with the men that were on the drive—to the men on the lake and the sweep—to arrange with them to stay on the drive, that we would pay these men. For that time he was going as our agent—for that one particular time; he was no permanent agent." Then he said: "The men were to be paid for the time that they had worked for McCrae and the time they remained with us until the drive was completed."

In accordance, then, with this understanding, James Bailey went upon the drive, and there he saw the plaintiff, and I find that he told plaintiff that he was sent up by defendants to say to all the men (he being one of them) to go ahead with the work; that Gillies had taken the drive over from McCrae, and that Gillies would pay the men from the beginning (this took place at the drive); that the plaintiff was to shove on the work and continue until the drive was finished, or until defendants discharged him, and that the defendants would pay what was due to him from McCrae. I find also that in consideration of this promise and the fact that defendants had taken over the whole drive and were to receive from the other owners what was, or would be, due to McCrae from them, which was estimated at about $1,700, exclusive of $1000 which was in Gillies' hands, payable to McCrae, the plaintiff continued on the work and assisted with his men to push on the drive until the night of the 29th September, after which he was directed by Kerr, the agent of the defendants, to send his bill to the defendants, which he did, amounting to $352, of which $100 was for the job work between 29th May and 10th July, and for 188 days (for himself and men), at $1.50 per day, from which, however, he deducted $30 for shoving through logs for Caldwell & McKay, leaving a balance of $352, but omitting to credit the $50 paid McCrae on account of the job work, as sworn to by McCrae, as to which, however, there was no very satisfactory evidence—McCrae stating, however, that he had paid the $50—which I think defendants should receive credit for—leaving due to the plaintiff $302.

There was a dispute as to the amount of plaintiff's claim—that is, as to the amount which defendants admit they agreed to pay, and the amount which McCrae claimed they were to

pay plaintiff for him. Defendants contended it was only $50, the balance on the $100 for the work done by plaintiff between 29th May and 10th July; whereas McCrae declared it was for the whole amount of whatever claim plaintiff had against him for pushing on the logs from 10th July until defendants took the drive off McCrae's hands, which I find was the true arrangement made between McCrae, defendants, and the plaintiff.

The plaintiff's account is made out as if the whole of the work since 10th July had been done for defendants, and in order to make it clear, according to the evidence, I find it to be as follows:—

To balance due on job work done between 29th May and 10th July for McCrae	$50.00
" 46 days' work of 3 men, from 10th July to 31st August, at $1.50 for each, or $4.50 per day for each of 46 days	207.00
" 15 days' work of 2 men from 1st Sept. to 18th Sept. (when the drive was taken over by defendants) at $1.50 per day for each man, or $3 for each of 25 days	45.00
	$302.00
Less amount received by plaintiff from Caldwell & McKay for logs driven by plaintiff during above time	30.00
Leaving due by McCrae to plaintiff	$272.00
When the drive was taken over by defendants, and which they were to pay.	
Then, to this, add 10 days' work done by plaintiff for defendants under the arrangement after the drive was taken over by defendants—of 2 men, from 18th Sept. to 29th Sept., at $1.50 per man, or $3 for both	30.00
Making a total claimed by plaintiff of	$302.00

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The defence relied on by the defendants is that there was no memorandum in writing sufficient to satisfy the Statute of Frauds of the agreement alleged to have been made between the plaintiff and the defendants, and that there was no consideration for the defendants' promise, and that defendants received no benefit from the work of the plaintiff; and I have been referred to a great many cases in support of defendants' contention, viz.: *Beattie* v. *Dinnick* (1896), 27 O.R. 285; *James* v. *Balfour* (1882), 7 A.R. 461; *Bond* v. *Treahey* (1876), 37 U.C.R. 360; *Petrie* v. *Hunter* (1884), 10 A.R. 127; *Hoener* v. *Merner* (1884), 7 O.R. 629. On the other hand, the plaintiff contended that he was entitled to recover, and relied on *Tumblay* v. *Myers* (1858), 16 U.C.R. 143, as approved by the Divisional Court in *Beattie* v. *Dinnick*, 27 O.R. 285, at p. 295; and *McDonell* v. *Cook* (1845), 1 U.C.R. 542.

If plaintiff is entitled to recover, it must be on the ground that McCrae assigned his several contracts with the defendants and the other owners of the logs which he had agreed to drive down the Madawaska, etc., to the defendants, as well as all moneys in their hands, and which would be due to McCrae from the other owners, the defendants agreeing not only with McCrae but with the plaintiff, that if the men on the drive to whom McCrae was indebted for work thereon, the plaintiff being one of such men, would continue on the drive under the defendants until it was got through or until defendants should discharge them. I have already found that the plaintiff accepted the terms proposed to him, and agreed upon between defendants and McCrae; that plaintiff continued on the drive for ten or eleven days thereafter with his men, when he was discharged by Kerr, the defendants' agent. At the time the agreement was made by defendants to take over McCrae's contract, there was $1000 in defendants' hands, still payable to McCrae, besides about $1,750 in the hands of the other owners which would be payable to McCrae when the drive was finished; all of which defendants received, except about $430 which he allowed McCrae subsequently to collect from some of the other owners for taking down so much of the drive as belonged to Rathbun—the whole amount being $730, but owing to defendants not making "a clean sweep" of Rathbun's logs, they

deducted $300 from McCrae. But this was long subsequent to the taking over the drive by defendants, and with which the plaintiff had nothing to do, and after he was discharged by defendants.

On the whole case, I think the plaintiff is entitled to recover from the defendants $302. There is no doubt in my mind that he honestly did work which was worth that in assisting to get logs owned by the defendants and the other owners down the river and through the slides, and had the defendants not agreed to pay him what was due to him from McCrae, as well as for his work on the drive from the time the defendants took it off McCrae's hands, McCrae would not have allowed defendants to take it over, and the plaintiff could have garnished what was due to McCrae in the hands of the defendants and other owners.

The case was not presented in a clear manner; there was no marshalling of the plaintiff's evidence as presented; the facts seemed very much involved, and I have had great difficulty in straightening them out. McCrae was a most unsatisfactory witness, and some of his statements were inconsistent, but I have formed the opinion that defendants not having succeeded in getting the drive down as soon as they expected may have lost money by it, but that is no reason why he should not pay the plaintiff who did the work and earned the amount, viz., $302; the defendants received the benefit of that, and collected the money which the other owners had agreed to pay McCrae, less $730 due by Rathbun, and had in their hands at the time $1000.

I, therefore, order judgment to be entered for plaintiff for $302, with full costs of the action.

From this judgment the defendants appealed to the Divisional Court.

On February 17th, 1902, the appeal was argued before a Divisional Court composed of MEREDITH, C.J.C.P., MACMAHON, and LOUNT, JJ.

W. M. Douglas, K.C., for the appellants.

A. B. Aylesworth, K.C., for the respondent.

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Meredith, C.J.

May 8. MEREDITH, C.J.:—This is an appeal by the defendants from the judgment of Robertson, J., in favour of the respondent upon the trial before him, sitting without a jury, at Pembroke on the 9th May, 1901.

The facts and the findings of the learned Judge are fully set forth in his considered judgment, which was delivered on the 11th June, 1901, and it is unnecessary to repeat them.

I should have had difficulty in coming to the conclusion that the judgment of my learned brother could be supported merely upon the ground that a new and substantial consideration passed from the respondent to the appellants for the promise made by them to pay what was owing to the respondent for the work done by him for McCrae on the drive, and that the fourth section of the Statute of Frauds did not, therefore, apply.

Tumblay v. *Meyers* (1858), 16 U.C.R. 143, and the observations of my brother Street with regard to that case in *Beattie* v. *Dinnick* (1896), 27 O.R. 285, at p. 295, are referred to by my brother Robertson, and were relied on by the respondent's counsel as establishing that proposition, but looking at the whole of my brother Street's judgment, and the cases referred to by him, it is plain, I think, that he did not intend to express his assent to it.

Expressions of opinion in some of the English cases, no doubt, lend support to the contention, but as Mr. De Colyar points out (3rd ed., p. 130, *et seq.*), the law is otherwise, and so it was decided to be by the Court of Appeal in *James* v. *Balfour* (1882), 7 A.R. 461. See also *The Harburg India Rubber Comb Company*, and *Winter* v. *Martin* (1902), 18 Times L.R. 428.

The judgment may, however, be supported upon one or other of two grounds:

1st. That the result of the transactions between the appellants and McCrae and the respondent was that upon the taking over by the appellants of the drive from McCrae, the appellants assumed the liability of McCrae to the respondent, and the respondent accepted the appellants as his debtors in place of McCrae, whose liability to the respondent was put an end to; in other words, on the ground of novation; or,

2nd. That, assuming that McCrae's indebtedness to the respondent was not put an end to, the appellants took over the work, and the promise to the respondent was to pay the indebtedness out of the moneys coming to McCrae from the appellants, or which might come to the hands of the appellants from the other persons whose logs formed part of the drive. These moneys, according to the evidence, were turned over by McCrae to the appellants upon the express promise by them that they would pay the men who agreed to remain and did remain on the drive until it was put through or they were discharged, as the respondent did, not only the wages thereafter earned by them, but what was coming to them for the work they had done while McCrae had had charge of the drive.

In either view, the promise of the appellants was not within the fourth section of the Statute of Frauds.

De Colyar on Guarantees, 3rd ed., p. 81 *et seq.*, 103; *Clark* v. *Waddell* (1858), 16 U.C.R. 352.

The judgment should, therefore, be affirmed, and the appeal from it dismissed with costs.

G. F. H.

[IN CHAMBERS.]

1902
May 12.

REX EX REL. HENRY S. IVISON

v.

WILLIAM IRWIN.

Municipal Election—Quo Warranto—Tampering with Ballots—Breach as to Immediate Delivery of Ballot Box to Town Clerk—Setting Aside Election—Supporting Affidavits by vivâ voce Evidence—Admissability of Evidence as to How Voters Voted—Cross-examination on Affidavits After Commencement of Trial: R.S.O. 1897 ch. 223, sec. 177, sub-sec. 4, secs. 200, 204.

Where in a *quo warranto* proceeding under the Municipal Act, R.S.O. 1897, ch. 223, before a county Judge to set aside the election of a town councillor, it was found by the Judge upon a scrutiny of the ballot papers, having regard to the character of the evidence both *vivâ voce* and by affidavit, that such ballot papers had been tampered with, and there was also a breach of the Act in the deputy returning officer taking the ballot box to his own house instead of directly to the town clerk, and that it was impossible to say that the result of the election was not affected thereby, an order of the Judge setting aside the election was affirmed.

Affidavit evidence may be supported at the trial by *vivâ voce* evidence, although not mentioned in the notice of motion.

Regina ex rel Mangan v. *Fleming* (1892), 14 P.R. 458, referred to.

The provision of sec. 200 of the Act that "No person who has voted at an election shall in any legal proceeding to question the election or return, be required to state for whom he voted" must be construed, in furtherance of the object of the Act, as absolutely excluding such testimony.

After the trial of such proceeding has commenced it is discretionary with the Judge as to allowing a person who has made an affidavit to be cross-examined, though before the commencement of the trial cross-examination may properly be had.

THIS was an appeal by the respondent from the judgment of the senior Judge of the county of Essex, dated the 8th day of April, 1902, declaring void and setting aside the election of the respondent as a councillor of the town of Leamington.

There were ten candidates running for the office of councillors for the town, of whom only six could be elected. The respondent was elected by a majority of 101 votes over Mr. Coultice, the minority candidate who polled the vote next in number to the respondent, the vote being:

Irwin	300
Coultice	199
Majority for Irwin	101

The grounds of appeal were:

(1) The improper rejection of evidence tendered on behalf of the respondent;

(2) Admission of improper evidence on behalf of the relator;

(3) That oral testimony and evidence by affidavit was allowed to be adduced on behalf of the relator;

(4) That the learned Judge refused permission to cross-examine witnesses on their affidavits filed and read on behalf of the relator;

(5) That the learned Judge allowed witnesses called on behalf of the relator to refuse to answer proper questions put to them by counsel for the respondent.

The appeal was heard before MACMAHON, J., in Chambers, on 18th April, 1902.

Aylesworth, K.C., for the appellant.

J. H. Rodd, for the relator.

May 12. MACMAHON, J.:—The validity of the respondent's election was contested on the ground of alleged irregular and invalid acts committed at poll No. 3 in the said town, where George Irwin, a brother of the respondent, was deputy returning officer, and Charles R. Irwin, a son of George Irwin, was poll clerk.

At this poll 143 ballots were cast, one of which was rejected, and of the 142 counted, it appeared from the return made by the deputy returning officer that 132 had voted for the respondent Irwin.

On the motion, the affidavits of 29 electors who voted at poll No. 3 were read, each swearing that they had not voted for the respondent. In addition, 23 other voters gave *vivâ voce* evidence at the trial, most of them refusing to state for whom they had voted. Three of them, however, viz., Edwin Wigle, James Fox and Frederick Deslaurier, said they voted for the respondent. Joseph Derbyshire, one of the witnesses called, said he did not vote for the respondent; and John Robinson, another witness, said that he only voted for two candidates for councillor, Curtes and Proser; and Enoch Winsor, one other of the 23 witnesses, said he voted for only one candidate as councillor, viz., Caleb Curtes.

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The learned county court Judge, upon a scrutiny of the ballot papers, and having regard to the character of the affiants who made affidavits and of those who gave *vivâ voce* evidence at the trial, and crediting their statements, reached the conclusion that marks for other candidates were put on a number of the ballots after the ballot papers had been put in the ballot box.

After the marked ballots had been counted at the close of the poll, and while being put in an envelope, it burst at the end, and was in that condition when placed in the ballot box.

Charles Irwin, the deputy returning officer, made an affidavit in which he stated that after putting the ballot papers in the ballot box he locked and sealed the same in the presence of the poll clerk, scrutineers and other persons then in the polling place, and denied that the ballot box had been opened or that any ballot papers had been tampered with between the time he locked and sealed the box and the time he returned it to the office of A. G. Boles, the clerk of the town of Leamington, who was in his office when the box was left there. The deputy returning officer, after locking the ballot box, took it to his own house, before leaving it at the office of Mr. Boles. This was a violation of sec. 177, sub-sec. 4, which provides that no deputy returning officer in a city or town shall under any circumstances take the ballot box or packets, or allow the same to be taken, to his home, or house, or office, or place of business, or to any house or place whatsoever other than the office of the clerk of the municipality.

Mr. Boles was called as a witness and said that the ballot box when returned was locked but not sealed, and that he found the envelope containing the marked ballots open, as described. He also said that the deputy returning officer did not leave the key at the office when the ballot box was left there, but he (Boles) procured it from him an hour afterwards.

The respondent, Mr. Irwin, and Mr. Boles, the town clerk, occupied the same office, of which Irwin had a key.

Where out of 142 ballots cast at poll No. 3, 132 were found to be marked for the respondent, while 29 voters by their affidavits, and three other who gave *vivâ voce* evidence—in all, 32 voters—swore that they did not vote for him, there is the

strongest possible evidence that in some way access was had to the ballot box and the ballot papers tampered with.

With regard to the objection of the improper reception by the county court Judge of *vivâ voce* evidence on behalf of the relator, it being contended that he was precluded from supplementing his affidavit evidence by calling witnesses to give *vivâ voce* evidence, although their names were mentioned in the notice of motion, the question raised was disposed of adversely to the respondent's contention in *Regina ex rel. Mangan* v. *Fleming* (1892), 14 P.R. 458.

Enoch Winsor, who had made an affidavit which was read on the relator's behalf at the trial, in which he stated that he had voted for only one candidate as councillor, such candidate not being the respondent, was called as a witness on behalf of relator at the trial, and, although objection was raised to the evidence, he was allowed to state the name of the candidate for whom he voted. And John Robinson, after stating that he did not vote for respondent, was asked, by counsel for respondent, for whom he cast his ballot for councillors, and he replied for only two of the candidates—Curtes and Proser. It does not appear from the evidence, which was taken in longhand, that objection was taken by counsel for the relator to the question. And Edwin Wigle, James Fox, and Frederick Deslaurier, voters called by the relator, stated that they voted for the respondent, but it does not appear whether they were asked by counsel for the relator for whom they voted. If such question was asked, it is not noted that objection was taken by counsel for the respondent.

Section 200 of the Municipal Act, R.S.O. 1897 ch. 223, provides that: "No person who has voted at an election shall in any legal proceeding to question the election or return be required to state for whom he voted." Section 7 of the Dominion Elections Act, and sec. 158 of the Ontario Elections Act, R.S.O. 1897 ch. 9, are in like terms.

In the *Haldimand Election Case* (1888), 1 Elec. Cas. 529, at p. 547, the present Chief Justice of the Supreme Court in dealing with charge No. 6 said: "Nothing could be made of this charge without admitting evidence of voters to shew how they voted. This, I hold, cannot be done. To do so would, in

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my opinion, be a direct violation of the Act, which requires secrecy. . . . It is no answer . . . to say that secrecy is imposed for the benefit of the voter and that he can waive it, for I hold secrecy to be imposed as an absolute rule of public policy, and that it cannot be waived."

And the late Chief Justice Moss in the *Lincoln Election Petition* (1879), 4 A.R. 206, at p. 210, said: "The next question relates to cases in which it cannot be shewn, except by the statements of the voters themselves, either that they voted or for whom they voted. As to these we are asked: Can the statement of the voter be received as evidence that he voted or for whom he voted, either by proving statements so made, or by calling the voter as a witness to give evidence. It must be judicially recognized that the special object of the Legislature in adopting the method of voting by ballot was to protect voters against coercion and intimidation. It is obvious that these influences might equally affect subsequent statements made by an elector with respect to his vote. It would, therefore, in our opinion, be repugnant to the whole policy of the Act to admit such statements, either with or without the sanction of an oath. In sec. 132, sub-sec. 2, of the Election Act, the Legislature has shewn its anxiety to guard against the discovery of how a person has voted, until it has been proved that he has voted, and his vote has been declared by a competent tribunal to be invalid. Again, by sec. 115 it is expressly stated that no person who has voted at an election shall, in any legal proceeding to question the election or return be required to state for whom he has voted. Although this does not in express terms extend to the case of the voter voluntarily tendering himself as a witness, it is obvious that, even in that case, he must be subject to cross-examination. We think that this section should, in furtherance of the objects of the Act, be construed as absolutely exclusive of such testimony."

The improper reception of the evidence to which I have referred cannot, however, affect the judgment appealed against, as, without such evidence, there was the evidence of the 32 voters to whom credence was given by the learned county court Judge which, together with the scrutiny made by him of the ballots, afforded, as he considered, ample evidence that the

ballots had been tampered with after the ballot papers had been deposited in the ballot box at the close of the poll.

At the trial counsel for the respondent asked for leave to cross-examine the several affiants who had made the affidavits filed by the relator. The learned Judge of the county court refused, and his refusal is one of the grounds of appeal.

In *Regina ex rel. Piddington* v. *Riddell* (1867), 4 P.R. 80, Morrison, J., held that ordering the oral examination of the parties for the purpose of impeaching the facts sworn to by one Clinkenboomer and the respondent was discretionary with him and refused the application.

And in *Rex ex rel. Ross* v. *Taylor* (1902), 22 C.L.T. Occ. N. 183, the Master in Chambers followed *Piddington* v. *Riddell*, holding it was a matter of discretion permitting a cross-examination of persons who had made affidavits filed by the respondents in answer to the affidavits filed by the relator. There is no doubt that in the present case it was discretionary with the learned county court Judge, after the trial had commenced, to refuse leave to cross-examine.

As the practice in the High Court is applicable to *quo warranto* proceedings (*Rex ex rel. Roberts* v. *Ponsford* (1902), 22 C.L.T. Occ. N. 146) the respondent could before trial have cross-examined all persons who had made the affidavits filed by the relator.

It was claimed by the respondent that the election was saved by sec. 204 of the Act.

Although the deputy returning officer said that when taking the ballot box from the poll to the office of the town clerk he only called at his own house for a few moments, his taking the ballot box there was violating a very stringent provision of the Act, for which on conviction he would be liable to imprisonment for six months and to a fine of $400. This, together with the finding by the county court Judge that a large number of the ballots had been tampered with after the ballot papers had been placed in the ballot box, renders it impossible to say that such irregularities did not affect the result of the election.

The appeal must be dismissed with costs.

G. F. H.

[DIVISIONAL COURT.]

D. C.
1902
May 13.

REX v. MCGREGOR.

Municipal Corporations—By-law—Prohibition against Keeping Certain Quantities of Coal Oil, etc.—Conviction—Constitutional Law—Provincial Legislation—Municipal Act, R.S.O. 1897, ch, 223, sec. 542, sub-sec. 17—Dominion Legislation—Petroleum Inspection Act, 62 & 63 Vict. ch. 27 (D.).

The defendant was convicted of a breach of a city by-law, which enacted that no larger quantity than three barrels of rock oil, coal oil, or other similar oils, nor any larger quantity than one barrel of crude oil, burning fluid, naptha, benzole, benzine, or "other combustible or dangerous materials" should be kept at any one time in a house or shop in the city, except under certain limitations. The by-law was passed under sub-sec. 17 of sec. 542 of the Municipal Act, R.S.O. 1897, ch. 223, such section being headed "Storing and transportation of gunpowder," and providing "for regulating the keeping and storing of gunpowder and other combustible or dangerous materials," and was one of a group of sections under Division VI. of the Act headed "Protection of life and property," sub-division 3 of said division, which included sec. 542, being under the heading "Prevention of fires":—

Held, that sub-sec. 17 authorized the passing of the by-law, and that the conviction could be supported thereunder; that the words "other combustible or dangerous materials" were not limited by the *ejusdem generis* rule to gunpowder or other similar substances, but would include the substances set out in the by-law.

Held, also, that such legislation was not superseded by Dominion legislation, the Petroleum Inspection Act 1899, 62 and 63 Vict. ch. 27 (D.) dealing with the subject being expressly made conformable thereto.

THIS was a motion to make absolute an order *nisi* to quash a conviction made by the police magistrate of the city of Windsor on the 15th May, 1901, of the appellant, for that he on the 7th March, 1901, "and divers other days previous, being agent of the Queen City Oil Company, did keep at one time in a house or shop within the limits of the city of Windsor a larger quantity than three barrels of coal oil, rock oil, water oil or other similar oils, and a larger quantity than one barrel of crude oil, burning fluid, naptha, benzole, benzine or other combustible or dangerous materials, contrary to a certain by-law of the municipality of the city of Windsor, in the county of Essex, passed on the 9th day of August, A.D., 1897, and intituled a by-law for the prevention of fires and for other purposes therein mentioned."

On February 17th, 1902, before a Divisional Court, composed of MEREDITH, C.J.C.P., MACMAHON, and LOUNT, JJ., the motion was argued.

G. F. Shepley K.C., for the applicant. There was no power to pass the by-law in question here, and therefore the conviction cannot be supported under it : sub-sec. 17 of sec. 542 of the Municipal Act R.S.O. ch. 223, does not authorize the passing of a by-law dealing with coal oil, etc. The sub-section deals with gunpowder and "other combustible or dangerous materials." These latter words must be restricted to explosives of like kind as gunpowder. The case comes within the *ejusdem generis* rule. This is borne out by the Act of 1899, 62 Vict. (sess. 2) ch. 26, sec. 34, amending sec. 542, the added sub-sections clearly shewing that the words are used in the limited sense. As to the meaning of the word "combustible" see Murray's new English Dictionary, tit. "Combustible." The Provincial legislation is superseded by the Dominion legislation. The Provincial legislation is only to be in force so long as there is no Dominion legislation on the subject. The moment the matter is dealt with and the field covered by Dominion legislation it overrides the Provincial legislation, and the latter ceases to have any effect : Dominion Petroleum Act 1899, 62 & 63 Vict. ch. 27, secs. 26, 32 (D.); R.S.C. ch. 102, secs. 25, 32 ; Orders in Council, 2nd Aug., 1899 and 6th Oct., 1881.

W. M. Douglas, K.C., for the prosecutor, contra. The by-law was validly passed under sub-sec. 17 of sec. 542, for the words "other combustible or dangerous materials" used in the sub-section cannot be restricted merely to substances similar to gunpowder. The decisions shew that the *ejusdem generis* principle is not to be construed in the restricted sense contended for by the other side. The principle is that you must look at the object and purpose of the Act and give to the words their full reasonable meaning, and so construing the words here they would clearly include the substances referred to in the by-law ; *Anderson* v. *Anderson*, [1895] 1 Q.B. 749 ; Maxwell on Statutes, 3rd ed., p. 475 ; *Regina* v. *Solly* (1856), 1 Dears. & B. 209. Then as to the Dominion legislation this is expressly made subject to the municipal legislation as appears in the Order in Council passed on the 6th Oct., 1881, which is still in force.

J. R. Cartwright K.C., for the Attorney-General of Ontario, contra. The only question that the Attorney-General is called

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upon to discuss is the constitutional one. There is no question now, since the decision in the Manitoba case by the Privy Council, namely, *Attorney-General of Manitoba* v. *Manitoba License Holders' Association*, [1902] A.C. 73, that the local legislature has power to deal with this matter.

May 13. MEREDITH, C.J.:—No objection is taken to the form of the conviction, the appellant being desirious of testing the validity of the by-law and of the provision of the Municipal Act under the authority of which the council assumed to pass it.

The validity of the Provincial legislation relied on by the respondent being called in question, the motion stood over in order that the Attorney-General of the Dominion and the Attorney-General of the Province might be notified, and notice having been given to them, the motion came on again to be heard, when counsel appeared on behalf of the Provincial Attorney-General, but no one for the Attorney-General of the Dominion.

In support of the motion, counsel for the applicant contended:

(1) That the articles, which the applicant was convicted of having kept contrary to the provisions of the by-law, were not covered by the provisions of sub-sec. 17 of sec. 542 of the Municipal Act, and that there was no power to pass the by-law under that or any other provision of the Municipal Act.

(2) That the sub-sec., if it is applicable to the articles mentioned in the conviction, is *ultra vires* the Provincial Legislature and void.

The by-law is entitled "A by-law for the prevention of fires and for other purposes therein mentioned," and its recital is as follows:—

"Whereas it is necessary and expedient to make provision for the prevention of fires and to that end to regulate the erection and alteration of buildings and the accumulation and storage of inflammable and combustible materials in the city of Windsor."

By its thirty-second section it provides as follows:—

"XXXII. No larger quantity than three barrels of rock oil, coal oil, water oil, or other similar oils, nor any larger quantity

than one barrel of crude oil, burning fluid, naptha, benzole, benzine or other similar combustible or dangerous materials shall be kept at one time in any house or shop within the limits of said city; nor shall any person permit any of the said fluids to leak or flow into any drain or sewer in said city. Provided nevertheless that when fire-proof buildings, so constructed as to insure at all times thorough ventilation thereof, and to be used exclusively for the purpose of keeping or storing rock oil, coal oil, water oil, or other similar oils, are sufficiently drained, according to any rules or regulations of the Department of Inland Revenue of the Dominion of Canada, and are isolated or detached at least ten feet from any other building; and when fire-proof buildings, constructed and drained as aforesaid, to be used exclusively for the storing of burning fluid, crude oil, naptha, benzole, benzine or other similar combustible or dangerous materials, and isolated or detached at least 100 feet from any other building, then in both of said cases the fluids severally mentioned may be kept and stored in said buildings respectively in such quantities as said council by resolution thereof may determine;" and it was for an offence against this section that the conviction was made.

The authority mainly relied on to support the by-law is sub-sec. 17 of sec. 542 of the Municipal Act. The section forms part of division 6 of the Act; and, according to its heading, division 6 deals with protection to life and property. Sections 542, 543 and 544 form sub-division 3 of division 6, and the sub-division is stated to be one dealing with "prevention of fires."

The sub-section itself is headed; "Storing and transportation of gunpowder," and is as follows:—

17. For regulating the keeping and transporting of gunpowder and other combustible or dangerous materials; for regulating and providing for the support by fees of magazines for storing gunpowder belonging to private persons; for compelling persons to store therein; for acquiring land as well within as without the municipality, for the purpose of erecting powder magazines; and for the selling and conveying such land when no longer required therefor."

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It was argued by Mr. Shepley that the *ejusdem generis* rule should be applied to the words "and other combustible or dangerous materials," and that they, therefore, apply only to articles or things which are combustible or dangerous, like as gunpowder is, and that they must therefore be confined to explosives.

It has been pointed out in the more recent cases that the rule which Mr. Shepley invokes has been often pushed too far: *Anderson* v. *Anderson*, [1895] 1 Q.B. 749; *Re Stockport, Ragged, Industrial and Reformatory Schools*, [1898] 2 Ch. 687, at p. 696; and in the former of these cases the Court of Appeal approved the canon of construction laid down by Knight Bruce, V.C., in *Parker* v. *Marchant* (1842), 1 Y. & C. 290, that general words are to be given their common meaning unless there is something reasonably plain on the face of the instrument to be construed to shew that they are not used with that meaning, and that the mere fact that general words follow specific words is not enough. But even if the canon of construction were the reverse of this and, *primâ facie*, the general words were to be given a restricted meaning (Maxwell on Statutes, 3rd ed., pp. 475-6), looking at the evident, if not the declared, purpose of the whole section—the prevention of fires—and the powers given by the various sub-sections to enable councils to pass by-laws to that end, it appears to me that the sense in which the word "combustible" and the word "dangerous" are used is that of liability to cause or spread fire.

It is hardly necessary to refer to dictionaries for the meaning of the word combustible; but if Murray is consulted it will be found that oil is mentioned as a combustible substance, and one of the meanings given for "inflammable" is "susceptible of combustion."

If the meaning I would give to sub-sec. 17 is given to it, as I understood Mr. Shepley, it is not disputed that the articles mentioned in sec. 32 of the by-law are combustible or dangerous, or both.

Mr. Shepley referred to the provisions of 62 Vict. (2) ch. 26, sec. 34, as supporting his contention, but they make, I think, against it. These provisions relate to the manufacture and storing of gunpowder and other explosive substances, and

indicate that when it was intended to speak of a substance as an explosive one, the word "explosive" was used and not the word "combustible."

I do not mean to concede that the articles mentioned in sec. 32 of the by-law are not or may not be explosive; indeed, I think it very probable that they are or may be.

It was argued in support of the other objection to the by-law that, inasmuch as the Parliament of Canada, by the Petroleum Inspection Act, 1899, 62 & 63 Vict. ch. 27, has legislated on the subject of the storing of petroleum and naptha, the Provincial legislation, in as far as it deals with the same subject, is superseded by the Dominion legislation.

The Act deals with the subject of the manufacture, sale and inspection of petroleum and naptha, imposes penalties for, amongst other things, the keeping or offering for sale, or having in possession, of petroleum or naptha which has not been inspected and entered for consumption through one of the ports or places duly authorized by the Governor in Council; and, by sec. 26, a penalty for keeping or storing of them when the provisions of the Act, or any order and regulation of the Governor in Council, or of any departmental regulations, have not been complied with. By sec. 32 the Governor in Council is authorized to make such regulations for the storage and possession of petroleum and naptha as he deems necessary for the public safety; and, by sec. 33, to designate places at which petroleum may be imported in tank cars and in tank ships, and, on the joint recommendation of the Ministers of Customs and Inland Revenue, to prescribe regulations under which it may be so imported; and, by sec. 34, the Department of Inland Revenue is authorized to make regulations, not inconsistent with the Act, with respect to the transportation, shipment and sale of imported or domestic petroleum or naptha.

This Act was brought into force on the 1st September, 1899, by proclamation of the 19th August previous.

By Order in Council of the 2nd August, 1899, which was declared to be applicable to the Act of 1899, when its provisions should be brought into force by proclamation, regulations were

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prescribed in relation to the importation of petroleum in bulk in tank ships at certain customs ports.

These regulations have no bearing on the question to be decided; but reliance was placed on the regulations of the 9th January, 1889, prescribed by Order in Council of that date, passed under the authority of sec. 25 of ch. 102 of the Revised Statutes of Canada.

This section is the same as sec. 26 of the Act of 1899, by which latter Act, ch. 102 of the Revised Statutes was repealed.

These regulations are in force notwithstanding the repeal of ch. 102 (R.S.C. ch. 1, sec. 7 (50)), and as far as they are material to the present inquiry are as follows:—

"Section 1. In cities and towns where there are municipal regulations or laws respecting the storage of petroleum and the products thereof, petroleum and naptha, which have been inspected as required by Act 44 Vict. ch. 23, or by "The Petroleum Inspection Act" aforesaid, and the inspection fees paid, may be stored in any building or place which is in conformity with the municipal regulations in that behalf."

Assuming the provisions of these Acts and regulations to be *intra vires* the Dominion Parliament, it is clear, I think, that they do not supersede the Provincial legislation referred to or any by-laws passed under the authority of that legislation.

The Provincial legislation was intended to confer power to make regulations in the nature of police or municipal regulations of a merely local character for the prevention of fires and the destruction of property by fire, and applying the language of Sir Barnes Peacock in delivering the judgment of the Judicial Committee of the Privy Council in *Hodge* v. *The Queen* (1883), 9 App. Cas. 117, at p. 131, as such cannot be said to interfere with the general regulation of trade and commerce, which belongs to the Dominion, and do not conflict with the provisions of the Petroleum Inspection Act, 1899, or the regulations as to the storage of petroleum and naptha, which are in force under the authority of that Act.

On the contrary, the Dominion regulations are carefully framed so as not merely not to conflict with the municipal regulations on the subject with which they deal, but to require these regulations to be conformed to as the condition upon

which it is to be lawful to keep or offer for sale or have in possession petroleum or naptha. See also *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A.C. 348 ; *Attorney-General of Manitoba* v. *Manitoba License Holders' Association*, [1902] A.C. 73.

The objections taken to the conviction therefore fail, and the motion must be dismissed with costs.

MacMahon and Lount, JJ., concurred.

G. F. H.

[DIVISIONAL COURT.]

REX v. BENNETT.

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1902
May 14.

Conviction—Motion to Quash in Criminal Matter—Costs—Jurisdiction.

On a motion to quash a conviction, such conviction being in a criminal matter, and not merely for a penalty imposed by or under Provincial legislation, no jurisdiction is conferred on the High Court to give costs to the applicant against the prosecutor or magistrate.

This was a motion for an order to quash a conviction of the applicant, made on the 24th June, 1901, by James Lochore, Esquire, a justice of the peace for the district of Algoma, for "obtaining food and lodging under pretence of going to work for the Michigan Land and Lumber Company, Blind River, on the 21st, 22nd, 23rd, and 24th June, A.D. 1901," by which the magistrate adjudged that the applicant should pay a fine of $10 and $8.33 costs, and that in default of payment within two hours the applicant should be imprisoned in the common gaol of the district at Sault Ste. Marie for the space of fourteen days, unless these sums and the costs and charges of the commitment and conveying the applicant to the gaol should be sooner paid.

On February 20th, 1902, before a Divisional Court composed of Meredith, C.J., and Lount, J., the motion was argued.

W. M. Douglas, K.C., for the applicant.

F. Denton, K.C., for the prosecutor.

W. E. Middleton, for the magistrate.

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May 14. MEREDITH, C.J.:—On the argument of the motion, it was conceded by counsel for the prosecutor and for the magistrate that the conviction must be quashed. The applicant asked for costs against both the prosecutor and the magistrate. They contended that costs should not be given against them, and counsel for the magistrate asked for an order for his protection under sec. 891 of the Criminal Code, 1892.

We are of opinion that this being a proceeding in a criminal matter, the Court has no jurisdiction to give costs against the prosecutor or against the magistrate.

The question as to costs must be determined apart from the provisions of the Judicature Act, which have no application to the practice or procedure in criminal matters (section 191), as indeed they could not, because the power to legislate on that subject is by the British North America Act, 1867, assigned exclusively to the Parliament of Canada.

The practice and procedure in all criminal causes and matters in the High Court, as was pointed out by the present Chief Justice of Ontario in *Regina* v. *Beemer* (1888), 15 O.R. 267, at p. 270, are to be the same as the practice and procedure in similar causes and matters before the establishment of the High Court: 46 Vict. ch. 10, sec. 2 (D.), now sec. 754 of the Criminal Code, 1892.

What that practice was is pointed out in *Regina* v. *Parlby* (1889), W.N. 190; 6 Times L.R. 36; 53 J.P. 774, which shews that the Court had no inherent jurisdiction to award costs against the prosecutor on the making of a rule absolute to remove a conviction by *certiorari*, or a rule absolute to quash a conviction so removed, and that the Court has no statutory authority conferred upon it to do so.

This view has been recognized in numerous cases as correct, and has been acted upon by the Court of Appeal: *London County Council* v. *Churchwardens and Overseers of West Ham (2)*, [1892] 2 Q.B. 173; *Re Fisher*, [1894] 1 Ch. 53, 450; *Regina* v. *Justices of the County of London and London County Council*, [1894] 1 Q.B. 453; *Regina* v. *Jones*, [1894] 2 Q.B. 382. See also *Regina* v. *Lee* (1882), 9 Q.B.D. 394, at p. 396, *per* Field, J.

Two cases are reported in which the English High Court, after the passing of the Judicature Act, gave costs; in one of them against the respondents on making absolute a rule *nisi* to quash in part an order of the quarter sessions: *Regina* v. *Goodall* (1874), L.R. 9 Q.B. 557; and the other against the magistrate: *Regina* v. *Meyer* (1875), 1 Q.B.D. 173; but both of these cases were before the decision in *In re Mills, Ex p. Commissioners of Works and Public Buildings* (1886), 34 Ch. D. 24, by which it was settled, contrary to what had been thought by some Judges, that the Judicature Act had not conferred on the High Court any new jurisdiction as to costs.

Regina v. *Parlby*, according to the report of it in 22 Q.B.D. 520, at p. 528, would seem to be another case of the same class; but the statement made there that the rule was made absolute with costs is erroneous. The subsequent reports of the case, which have been mentioned, shew that the question of costs was not dealt with when the decision of the Court there reported was given, but was subsequently argued, when costs were refused on the ground stated in the subsequent reports.

In this Province costs have been awarded against the prosecutor in several cases. Most of them were decided before *In re Mills, Ex p. Commissioners of Works and Public Buildings*; and in some of them the conviction or order quashed was for a penalty imposed by or under the authority of provincial legislation, to which different considerations apply, at all events since the passing of the Law Courts Act, 1896, 59 Vict. ch. 18, sec. 2, schedule (35), by which the provision which up to that time was contained in the Judicature Acts, by which proceedings on the Crown or Revenue side of the Queen's Bench and Common Pleas Divisions were excluded from the operation of those Acts, was repealed.

If the question to be determined were one of practice only, we should not feel justified in disturbing any settled practice that had been shewn to exist, but as it is not of that character, but, as I have said, one as to the jurisdiction of the Court, and being of opinion that the Court has no jurisdiction to award costs in a criminal matter against the prosecutor, we are bound to disregard that practice and to give effect to that opinion.

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Cases in which costs have been given against an unsuccessful applicant for a writ of *certiorari* or to quash are to be distinguished, for in such cases the Court has jurisdiction to give costs against the applicant, either because of the recognizance which he has entered into to pay the costs, or of the inherent power which the Court possesses to give costs as a punishment for erroneously putting the jurisdiction of the Court in motion.

The conviction will, therefore, be quashed without costs, and there will be no order for the protection of the magistrate.

Lount, J., concurred.

G. F. H.

[DIVISIONAL COURT.]

O'HEARN v. TOWN OF PORT ARTHUR.

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May 17.

Street Railways—Negligence—Collision—Contributory Negligence.

The plaintiff, who was driving a horse and waggon very slowly along a street on the left side of a car track, turned to the right to cross the track and the waggon was struck by a car which had been coming behind. The plaintiff said that about one hundred feet from the point at which he tried to cross he looked back and that no car was to be seen, and he did not look again before trying to cross :—

Held, that it was his duty to have looked, and that his not having done so constituted contributory negligence on his part, which disentitled him to recover damages.

Danger v. *London Street R. W. Co.* (1899), 30 O.R. 493, applied.

Judgment of Britton, J., reversed.

Per BOYD, C. :—A driver of a vehicle moving along a street in which cars are running, and who knows when and where he intends to cross the car-tracks, is bound to be vigilant to see before crossing that no car is coming behind him. A greater burden in this regard rests on the driver than on the motorman, who is not to be kept in a state of nervousness and apprehension lest someone may at any moment cross in front of the moving car.

ACTION to recover damages for injuries sustained by the plaintiff in a collision with an electric tram car under the charge and control of the servants of the defendants, who, under the powers contained in the Municipal Act, operated an electric street railway in the town of Port Arthur.

The action was tried at Port Arthur before Britton, J., and a jury, on the 14th of December, 1901, and the following is an outline of the facts :—

The accident took place on Cumberland street in the town of Port Arthur, about four o'clock in the afternoon of the 4th of November, 1901. Cumberland street runs in a north and south direction and is crossed by Manitou street from east to west, and has a sharp curve about five hundred feet south of Manitou street. The plaintiff, who was a teamster, was driving in a waggon along Manitou street in an easterly direction, and turned north along Cumberland street, keeping on the west side of the street and to the west of, and close to, the car track, which was in the centre of the street. He was familiar with the locality and the times at which the cars were run and their usual rate of speed. He said that as he turned the corner at Manitou street he looked to the south along Cumberland street

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as far as the curve and that no car was then to be seen; that he then drove very slowly along Cumberland street, and that, after going about four hundred feet along that street, he looked back again and that still at that time no car was to be seen; that he then drove on, almost at a walk, about eighty or one hundred feet further and, without looking back, turned across the track intending to drive to the east down Ambrose street, which runs east from Cumberland street, and was then run into by the car, no warning of its approach having been given. The motorman said that he saw the plaintiff some time before the accident and sounded his gong, and that as the plaintiff turned on the track he shouted to him to look out, but did not try to stop the car as there was no time for that. He also said that the plaintiff was apparently talking at the time to some children who were in the waggon. The evidence of the motorman, of the conductor, and of some of the passengers, was to the effect that the car was running at the rate of not more than six or seven miles an hour. It was also stated, however, by some of the witnesses, that the car was running at "about its usual rate of speed," and the plaintiff, against the objection of the defendants, was allowed to give the evidence of two witnesses who stated that on a subsequent occasion they tested the rate of speed of cars, which seemed to be running at the usual rate of speed, and found that the rate was nearly twenty miles an hour. Questions were submitted to the jury, which, with their answers to them, were as follows:—

1. Were defendants guilty of negligence in running their car on the occasion of the accident at too great a speed? We find upon this question that in the opinion of the jury the speed of the car on this occasion was excessive.

2. Were the defendants guilty of negligence in not so running their car as to be able to control it or stop it in time to prevent a collision with the plaintiff, who was seen by the motorman, and who, for all the motorman knew, might turn down, as he did actually turn down, Ambrose street? We believe the motorman was negligent upon this occasion.

3. Was the gong sounded by the motorman as the car approached the plaintiff on Cumberland street? We are of the opinion on the evidence given that the gong was not sounded.

4. Could the plaintiff by the exercise of ordinary care have avoided the accident? We do not think he could have avoided the accident, nor can he be justly accused of ordinary negligence.

5. What damages has plaintiff sustained? The jury feel that $200 would be a reasonable amount of damages.

Upon these answers judgment was entered in favour of the plaintiff for $200 and costs.

A motion by the defendants against this judgment was argued before a Divisional Court [BOYD, C., and MEREDITH, J.], on the 10th and 11th of April, 1902.

N. W. Rowell, for the defendants. The accident resulted from the plaintiff's own want of care and there should have been a nonsuit, or at the least the jury should have been directed to find contributory negligence: *Dublin, Wicklow and Wexford R.W. Co.* v. *Slattery* (1878), 3 App. Cas. 1155. The case is not distinguishable from *Danger* v. *London Street R.W. Co.* (1899), 30 O.R. 493. There was no evidence whatever of negligence. The case of *Halifax Electric Tramway Co.* v. *Inglis* (1900), 30 S.C.R. 256, has been relied on, but it is clearly distinguishable. The accident in question there occurred at what was known to be a dangerous place. It was the duty of the plaintiff to look before crossing the track. The case is very like *Follet* v. *Toronto Street R.W. Co.* (1888), 15 A.R. 346; and see also *Weir* v. *Canadian Pacific R.W. Co.* (1888), 16 A.R. 100. This case is even stronger than that one, because here there was no duty to give any signals. There is no evidence to support the finding of the jury that the speed of the car was excessive. All the evidence properly admissible is contrary to this finding, and the only evidence upon which it could be based should not have been admitted at all. The plaintiff could easily have kept out of the way of the car while the car was on a fixed track which it could not leave, and there is a *primâ facie* case of negligence on the plaintiff's part. There is, it is true, a conflict of evidence as to the sounding of the gong, but even adopting the finding on this point, not sounding the gong was not, under the circumstances of this case, negligence. The plaintiff was on the wrong side of the street and there was, therefore, a greater burden

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imposed on him of taking care: 2 Shearman & Redfield on Negligence, 5th ed., sec. 651; Beach on Contributory Negligence, 3rd ed., sec. 282. See also upon the general question *Allen* v. *North Metropolitan Tramways Co.* (1888), 4 Times L.R. 561; *Wright* v. *Midland R.W. Co.* (1884), 51 L.T.N.S. 539; *Skelton* v. *London and North Western R.W. Co.* (1867), L.R. 2 C.P. 631; *Stubley* v. *London and North Western R.W. Co.* (1865), L.R. 1 Ex. 13; *Phillips* v. *Grand Trunk R.W. Co.* (1901), 1 O.L.R. 28; *Coyle* v. *Great Northern R.W. Co.* (1887), 20 L.R. Ir. 409.

J. H. Moss, for the plaintiff. The questions in issue were for the jury and they have decided them in favour of the plaintiff upon evidence properly submitted to them. Taking all the circumstances of the case into consideration they have found against the defence of contributory negligence. The Judge would not have been justified in withdrawing the case from the jury: *Morrow* v. *Canadian Pacific R.W. Co.* (1894), 21 A.R. 149. The defendants were bound to take reasonable care to avoid any injury to persons lawfully upon the highway, and the jury in this case have found that they did not take reasonable care. See *Ewing* v. *Toronto R.W. Co.* (1894), 24 O.R. 694; *Toronto R.W. Co.* v. *Gosnell* (1895), 24 S.C.R. 582; *Green* v. *Toronto R.W. Co.* (1895), 26 O.R. 319; *Hamilton Street R.W. Co.* v. *Moran* (1895), 24 S.C.R. 717; *Haight* v. *Hamilton Street R.W. Co.* (1898), 29 O.R. 279; *Halifax Electric Tramway Co.* v. *Inglis*, 30 S.C.R. 256; *Rowan* v. *Toronto R.W. Co.* (1899), 29 S.C.R. 717. In *Danger* v. *London Street R.W. Co.*, 30 O.R. 493, the plaintiff deliberately drove in front of a car, knowing that it was coming behind him; and knowledge of the plaintiff of the danger was also the salient feature in *Follet* v. *Toronto Street R.W. Co.*, 15 A.R. 346. The finding as to excessive speed is supported by the evidence, and cannot be disregarded. It was competent for the plaintiff to shew what the "usual rate of speed" was, and the evidence on that point was admissible. Apart from it, however, it is manifest that the car must have been running at an excessive rate of speed, for it must have come from the curve on Cumberland street to the place of the accident while the plaintiff was driving not more than one hundred feet. The jury have found, too, that the gong

was not sounded, and it was peculiarly the duty of the motorman to give warning in this way, as he must have known that the plaintiff might have to cross to the east side of the street at any moment.

Rowell, in reply.

May 17. BOYD, C.:—The competent evidence, undisputed, shews that the tramcar did not run on Cumberland street at an extraordinary or excessive speed. The witnesses on both sides agree that the speed was the usual and ordinary speed and it is measured both by plaintiff's and defendants' witnesses at six or seven miles an hour. Of the plaintiff's witnesses, those in the car at the time and those who were onlookers do not notice or speak of any unusual or extravagant running; it is left for two persons to fix the rate at over twenty or thirty miles an hour, who took notes of the speed on a subsequent day, in a different car, and under different officers, and, it may be, under manifold different circumstances from those which obtained on the day in question. This line of evidence should be eliminated and it leaves no practical dispute among the real witnesses as to the rate of speed.

But apart from this, it appears to me that the evidence of the plaintiff, and for the plaintiff, shews that the accident arose entirely from his inexcusable want of ordinary care in crossing the track as he did. His negligence is the proximate cause, the *causa causans*, of the accident. He lived in the town during the twelve years that the line had been in operation; he knew that the cars did not stop to let passengers off at Ambrose street, and he knew the time of the trips and the exact rate of speed through the town part of the journey. He knew he was going to turn and cross the track at the point where he was hurt, and a greater duty and obligation rested on him to protect himself than was cast upon the motorman to anticipate a rash movement from which he is to protect the vehicle and its driver.

The place was not one of danger or difficulty in which it behoved the car driver to exercise special care. By a turn of the head before crossing the plaintiff could have avoided all danger. Had he seen the car, he admits he would have been

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crazy to make an attempt to cross. He says he looked back about one hundred feet from the place where he did turn, but in earlier examination he puts the distance at as many yards—but either way, according to the view of many authorities binding upon us, he failed to use ordinary care for his own safety.

The dissentient judgment of Mr. Justice Gwynne in *Halifax Electric Tramway Co.* v. *Inglis,* 30 S.C.R. 256, at p. 281, embodies a collection of English and Ontario cases supporting the latest case in this Court of *Danger* v. *London Street R.W. Co.*, 30 O.R. 493. These cases are still of authority, and are not over-ruled by the majority of the Judges in the Supreme Court. For the decision in the *Halifax* case rested on its special facts—that the place of the accident was on a down grade which called for special caution on the part of the tramway company, and that, though the plaintiff was negligent, yet he was seen by the car driver in time to have stopped the car by the exercise of reasonable care.

In that respect this case is very clearly distinguishable: here it was an up grade, and no power could have arrested the car when the plaintiff turned his horse on the track.

I do not attach material or essential importance to the finding (on a conflict of evidence) that the gong was not sounded in this case. To sound the gong at any time or place was not a matter of statutory or other like obligation; perhaps, at most, it was a customary or usual thing to do so when danger was apprehended or the track was obstructed by persons or vehicles. But on a clear track, with no apparent danger, it would be more likely to startle some horses if the gong sounded as they were approached than to contribute to the safety of the passengers. There appears to me in this case to be no evidence of negligence on the part of the defendants contributing to the accident because of the jury's finding that the gong was not sounded, it being the case of a single waggon jogging along the side of the street and not in danger as long as it held on the even tenor of its way, with the car approaching from the rear at the usual speed, which would have passed in safety had not the driver of the waggon turned upon the track: see *Allen* v. *North Metropolitan Tramways Co.*, 4 Times L.R. 561.

Of cases cited by the respondent all have points of material distinction. *Ewing* v. *Toronto R.W. Co.*, 24 O.R. 694, was a case of obvious danger on the track if the motorman could not control his car. In *Toronto R.W. Co.* v. *Gosnell*, 24 S.C.R. 582, it is found that the car might have been stopped after the man was seen on the track if it had been under proper control, but the contrary is laid down with the assent of both parties as being one of the undisputed parts of this controversy—the turn of the plaintiff was at the very moment the car was upon him. *Green* v. *Toronto R.W. Co.*, 26 O.R. 319, is, like the *Ewing* case, one where the person hurt was on the track in actual peril if the car was not arrested. Of like character was the case of *Hamilton Street R.W. Co.* v. *Moran*, 24 S.C.R. 717, the plaintiff "was injured by a car striking him while working on the track." He was in a position of apparent peril, and no proper care was taken of the car as it approached. *Haight* v. *Hamilton Street R.W. Co.*, 29 O.R. 279, was the case of an aged and infirm person who was crossing the tracks and manifestly unable to help himself out of danger. *Rowan* v. *Toronto R.W. Co.*, 29 S.C.R. 717, turned upon the effect of material findings of the jury upon sufficient and relevant evidence.

The highest American authorities tend to support the present disposition of this case adversely to the plaintiff: see *Railroad Co.* v. *Houston* (1877), 95 U.S. 697, followed in *Schofield* v. *Chicago, etc. R.W. Co.* (1884), 114 U.S. 615, and *Northern Pacific R.W. Co.* v. *Freeman* (1898), 174 U.S. 379.

Another point in the case adverse to the plaintiff is that he was on that side of the road which would repel the idea that he was intending to cross the track to go down the small street called Ambrose street, near which he turned into the car: see *Jardine* v. *Stonefield Laundry Co.* (1887), 14 Rettie 839.

When vehicles are moving ahead of the cars and in the same direction it is reasonable to hold that the drivers of the vehicles, who know when and where they are going to turn and cross the track, should be vigilant to see that no car is coming behind them. A greater burden in this regard should rest on the drivers than on the motorman, who is not to be kept in a state of nervousness and apprehension that some one or every one ahead may cross in front of the running car at any

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moment. The driver can move in any direction—not so the motorman. The right of way being with the car the driver should keep out of its track, unless, upon observation, he is satisfied that the passage is clear.

I would, therefore, reverse the judgment and direct judgment for the defendants as upon a nonsuit.

If defendants ask costs, they should be on the lower scale.

MEREDITH, J.:—It would have been better if the usual questions had been submitted to the jury. Little is ever gained by departing from well settled forms; often a good deal is lost. In this case there is no direct finding that the negligence which the jury attributed to the defendants was the proximate cause of the plaintiff's injury; the usual question was not asked. Nor was the question whether, assuming the plaintiff to have by negligence contributed to the accident, might the defendants yet have, by the exercise of ordinary care, avoided the injury. This subject seems to have been dealt with, during the charge, by withdrawing it from the jury on the ground that it was plain that the injury could not have been so avoided. This was done in the plaintiff's interests, it being said that the defendants conceded it. It seems to have been overlooked at the moment that it might also, in another view of the case, the one now being dealt with, aid the plaintiff, and no assent on his part is mentioned. Both parties are perhaps now precluded from urging that the injury might have been so avoided; still it would have been more satisfactory to have had the usual answers.

And, if the case should have gone to the jury at all, it would have been better if the jury had been charged at least somewhat in accordance with the law as expounded in the case of *Danger* v. *London Street R.W. Co.*, 30 O.R. 493.

That is a case which was binding upon the trial Judge and is under the statute binding upon us. It was the latest case upon the same questions, and, in its facts most like this case, and is the judgment of a Divisional Court.

But the main question is whether the plaintiff ought to have been nonsuited on the ground of contributory negligence.

He should have been if the *Danger* case was well decided, and, whether it was or not, it was binding as I have said, and so there should have been a nonsuit. I am quite unable to distinguish this case from that. The few minor differences of fact seem to me to make this case rather stronger than that was, against the plaintiff. In that case the plaintiff was driving in a covered buggy, under very considerable difficulty of hearing and seeing anything behind him; in this case the plaintiff was driving on the top of an open coal cart, with no obstruction to his view in any direction, and had but to turn his head to know whether his way was safe or dangerous. In that case the plaintiff had looked back and had seen an approaching car, but so far away—many hundreds of feet—that he thought he could cross before it overtook him, but he did not look when he ought to have looked, just before attempting to cross; in this case the plaintiff looked back several hundreds of feet, and again about one hundred feet, before attempting to cross, but by reason of a turn in the road he could not see an approaching car unless within about eight hundred feet from him at the furthest; beyond that he could know nothing by sight, within it he might fail to observe. In the *Danger* case the track was a straight line as far as the eye could see, and in that case the plaintiff's attention was distracted by another car approaching in the opposite direction. In this case, the whole line and the whole public street were clear except for the plaintiff's cart and the car into which he turned, and all there was to distract his attention was some children riding by his leave at the tail of his cart.

I understand the *Danger* case to decide this: That, under ordinary circumstances, any one attempting to cross an electric street railway, with a knowledge of the constant running of cars upon it, such as is usual in cities and towns, without looking, is negligent. I entirely concur in that view of everyone's duty to himself, and to all else whom he may endanger by want of that ordinary care. No reasonable man could, in my judgment, say that, in the facts of this case, there was not great negligence in attempting to cross without looking. Looking meant a mere turn of the head. The man was not going on in the same course; he was on the wrong side of the road in regard

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to passing other vehicles, and he was about to turn at right angles to his course and immediately upon the car track. This he knew; the change was the result of his own thought, and his own action. He knew that he was passing from a place of safety into a place of general danger; he intended to do that, and did it, but did it without taking the trouble—if trouble it can be called—to turn his head and know whether he safely might. His one excuse seems to me to condemn rather than acquit him, if it really have any effect upon the question at all. He looked when about four hundred feet, and again about one hundred feet, before attempting to cross. If it was right to look at four hundred or one hundred feet away, how much more so just before going upon dangerous ground. The noise of his cart—the excuse for not hearing—made it more imperative to look at the proper place and time. When he looked first, about four hundred feet away, a car would be out of sight at about four hundred feet off; when he last looked, at about eight hundred feet it would be out of sight; at each or either time it might be in sight and he have failed to observe it. I cannot imagine any ordinarily careful person acting as the plaintiff says he did just before turning upon the track. His position on the left hand side of the road would indicate that he was going to stop at some place on that side, or to turn to the left at one of the cross streets, if it indicated anything. Some measure of care is required of a driver ahead; if his stopping or turning one way or other will interfere with traffic behind him he should indicate his intention in time by raising his whip or arm or in some other recognized or sufficient manner.

Then the one question is: Was the plaintiff upon his own shewing guilty of negligence? That his act at least contributed to the injury is unquestioned and unquestionably, without it he could not have been injured.

All the facts are admitted; for the purposes of the motion for nonsuit the plaintiff's statement of them is accepted; no other evidence strengthens it upon this question. There is no disputed question of fact for the jury; no inference of fact to be drawn. All that has to be considered is, did his admitted act constitute negligence.

Is that a question for the Court or for the jury? Unhesitatingly I would say for the Court in the first place to say whether it afforded any reasonable evidence to go to the jury. It is for the Court to say whether there is any reasonable evidence upon which a jury could find either way, and it is only after that question is answered in the affirmative that it is for the jury to say what the finding should be.

There has been considerable discussion and difference of opinion as to the respective functions of judge and jury in actions such as this; but however it may be put, there is no doubt that the Court can and should direct judgment to be entered for the defendant when it is manifest that the plaintiff was guilty of contributory negligence.

The notion that prevailed to some extent for a while, that cases of railway negligence differed from other cases, and that the question whether negligence in them could be inferred from a given state of facts was itself a question of fact for the jury and not a question of law for the Court (see *Jackson* v. *Metropolitan R.W. Co.* (1876), 2 C.P.D. 125) was soon removed and the rule finally established that upon any given state of facts it is for the judge to say whether negligence can rightly be inferred, and for the jury to say whether it ought to be inferred: *Metropolitan R.W. Co.* v. *Jackson* (1877), 3 App. Cas. 193.

It is generally said that the judge should withdraw the case from the jury whenever the party upon whom the burden of proof rests fails to discharge it; and one of the learned lords who spoke in the *Slattery* case (*Dublin, Wicklow and Wexford R.W. Co.* v. *Slattery*, 3 App. Cas. 1155) plainly states that it is not competent for him otherwise to do so. But if that statement be correct, how can there ever be a nonsuit on grounds of *contributory* negligence?

The burden of proof is upon the defendant however and by whomsoever it may be proved. Suppose that in an action for negligence the plaintiff proves his case without giving evidence himself, and that afterwards he is examined as a witness of the defendant and proves that he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, must the case go to the jury? The law can hardly require a farce of that character. Again, suppose the plaintiff

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sues for the price of a horse, and, without going into the box, proves his claim, and that then he is called as a witness for the defence and proves that the price was paid to him on the day it fell due, but states that he ought to recover because the defendant afterwards sold the horse for twice what he paid for it, and that he is a poor man and the defendant is a rich man, must the case go to the jury?

Are not these cases in which judgment may be directed in favour of the party upon whom the burden of proof lies and who satisfies it? Is there any principle upon which the duty of the Court can be limited to cases of failure of proof? Is not the real question in all cases: Is there any reasonable evidence to go to the jury? Any evidence upon which any but the one verdict could be given by any reasonable jury?

I cannot understand how civil and criminal trials can be counted quite analogous, especially in those courts in which the accused is not a compellable or competent witness and in which admissions for the purpose of the trial cannot be made. There must be some difference where, as here, in most civil cases the judge may at any time before or during the trial dispense with the jury and find all the facts himself, and otherwise deal with the case entirely without regard to the jury. There is certainly no rule that no one shall be condemned in a civil action except with the consent of twenty-four of his peers. In this Province even an unanimous verdict of the petit jury is not required.

The rule generally prevailing in the United States of America seems to be fairly stated in Thompson on Negligence, vol. 1, sec. 428, thus: "Roundly speaking, where the undisputed facts clearly shew negligence on the part of the person injured, contributing to the accident, the judge ought to direct a nonsuit or a verdict for the defendant, although in order to do so he must necessarily *find an affirmative fact*, namely, that there was contributory negligence": see also sec. 426.

There are, of course, very few cases, other than those in which there are admissions at the trial, in which there is not some fact or inference for the jury, and in which of course no judgment can be entered except upon the finding of the jury.

In dealing with the *Slattery* case it must always be borne in mind that there could be no admissions in that case by the

person charged with the contributory negligence. He was killed by the collision which was the ground of the action.

And that case is not altogether helpful for the plaintiff. The opinions of the minority of the divided House are very much against him, whilst the following words of the Lord Chancellor, one of the majority, are not very helpful to him (p. 1166): "If a railway train, which ought to whistle when passing through a station, were to pass through without whistling, and a man were, in broad daylight, and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of the advancing train and to be killed, I should think the judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company, which caused his death."

There are too many instances of withdrawal of the case from the jury on the grounds of pure contributory negligence to compel effect to be given to the opinions of those who seem to say that that can never rightly be done.

Relying upon a defendant doing his duty will not always answer a charge of contributory negligence: if it would the defence of contributory negligence would vanish. One can not recklessly or imprudently walk into a moving car because if not negligently managed it might not be at that particular place at that particular moment.

It is not necessary, nor would it be proper, to lay down any absolutely inflexible "Stop, look and listen" rule. In many cases it is not needful to stop before crossing, especially if on foot; in some, where there is a sufficient view of the track, for instance, it is not needful to stop or to listen; sight, if properly exercised, is a perfect safeguard; nor in some, as, for instance, when the company expressly or impliedly say, "Come on, the track is clear, you can cross in safety," to stop, look or listen. But under ordinary circumstances no one exercising even a low grade of care or self-protection would cross without stopping, looking or listening.

The cases relied upon by Mr. Moss are not in point; their differences in fact and in principle were pointed out fully during the argument.

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Perhaps the strongest case that I have been able to find in the plaintiff's favour is *Scriver* v. *Lowe* (1900), 32 O.R. 290; but that was a case of "momentary forgetfulness" in a place which ought not to have been, and a sort of place that very seldom is, dangerous. In this case the act of the plaintiff was a voluntary and deliberate one—turning from a place of safety into a place of known more or less danger always, a place of great danger always to one who cannot hear and will not see.

I would allow the motion and dismiss the action. See *Fritz* v. *Detroit Citizens' Street R.W. Co.* (1895), 105 Mich. 50; *Winch* v. *Third Avenue Railroad Co.* (1895), 67 N.Y. State Rep. 322; *South Covington, etc., Street R.W. Co.* v. *Enslen* (1897), 38 S.W. Rep. 850.

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[IN THE COURT OF APPEAL.]

REX v. RICE.

Criminal Law—Murder—Prosecution of Unlawful Purpose—Common Design of Two or More Persons—Crim. Code, sec. 61 (2)—Evidence—Judge's Charge —Finding of Jury—Verdict—Mistrial.

The prisoner was tried for the wilful murder of a constable, the indictment containing one count. The evidence shewed that the prisoner and two other men were being tried for burglary, and during the trial were being conveyed in a cab from the court house to the gaol, in the lawful custody of two constables; that the prisoner and the other two accused men were handcuffed together on the back seat, and the two constables were seated opposite; that a parcel containing at least two revolvers was thrown into the cab by an unknown person; that the prisoner and at least one, and perhaps both, of the other two, each obtained and armed himself with a revolver, whereupon a struggle ensued in which one constable was shot and killed by one of those whom he had in custody.

The trial Judge told the jury to consider whether the prisoner fired the fatal shot, and if they thought his was not the hand that did so, or if they thought there was sufficient reasonable doubt to give the prisoner the benefit of it, they were to pass to the consideration of the second branch of the case, as to which his charge was in part as follows: "When men go out with a common intent to commit a felony, and in the pursuit of that unlawful purpose death ensues, it may or may not be murder on the part of those who do not actually strike the fatal blow. . . . Where all the parties proceed with the intention to commit an unlawful act and with the resolution or determination to overcome all opposition by force, if by reason of such resolution one of the party is guilty of homicide, his companions would be liable to the penalty which he has incurred. . . There is no evidence on which you could convict the prisoner of conspiracy up to the time the parcel was placed in the cab. . . . There is no evidence of conspiracy or common design up to the moment the parcel is thrown into the cab: yet if, at that moment, before the shot was fired that killed the constable, the three men resolved to escape from the lawful custody they were in, then each would be responsible for the acts of the other."

After retiring to consider their verdict, the jury returned into Court and stated that they wished to know definitely what the Judge had said on the subject of conspiracy or collusion, and he said: "I told you, gentlemen, there was no evidence upon which you could find that there was a conspiracy or collusion between the three men up to the time the parcel was thrown into the cab, . . yet if, at that moment, or at any time up to the time of the shooting of the constable, the three men resolved to escape from the lawful custody they were in, then each would be responsible for the acts of the other, and if you find that, between the throwing of the parcel and the shooting of the constable, there was such a resolution, even although one of the other men fired the shot, the prisoner can be convicted of murder."

The jury came into Court again and said that they had agreed on their verdict. The clerk asked them whether they found the prisoner guilty or not guilty. The foreman answered: "On the first *count* we disagree." The clerk: "How do you find on the second *count?*" The foreman: "On the second *count* we find the prisoner guilty." The verdict was recorded, with the consent of the jury given in the usual way, as follows: "The jury find the prisoner guilty. They are unable to agree as to whether the prisoner fired the shot which killed William Boyd:"—

Held, upon the evidence, that immediately upon the parcel being thrown into the cab, the prisoner and at least one of the other men armed them-

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selves with the revolvers and formed the common intention of, by the use thereof, prosecuting the unlawful purpose of escaping from lawful custody and of assisting each other therein, and that the shooting by one of them of the constable was an offence committed by one of them in the prosecution of such common purpose, and that the commission thereof was or ought to have been known to be a possible consequence of the prosecution of such common purpose: Criminal Code, sec. 61 (2); each of them was, therefore, a party to such offence, and the offence, being murder in the actual perpetrator thereof, was murder in the prisoner, even if he were not the actual perpetrator thereof, and he was properly found guilty by the jury of that offence, the evidence fully warranting their verdict.

2. That there was nothing in the charge, nor in the subsequent instruction to the jury, both of which must be read together, of which the prisoner could properly complain.

3. That the finding of the jury was a proper one, and there was no mistrial. The foreman of the jury in speaking of "counts" was referring to the two branches of the case; but their verdict was that recorded on the back of the indictment and acknowledged by them.

CROWN CASE RESERVED.

The following statement of facts is taken from the judgment of ARMOUR, C.J.O.

The prisoner was indicted for the wilful murder of one William Boyd, and was tried at a sittings of the High Court of Justice at the city of Toronto, on the 29th October, 1901, before FALCONBRIDGE, C.J.K.B., and a jury.

The evidence shewed that the prisoner, one Jones, and one Rutledge were being tried at the court of general sessions of the peace for the county of York upon an indictment for burglary, and on the evening of the second day of the trial were being conveyed in a covered cab, with the doors shut and the windows open, from the court house to the common gaol, in the lawful custody of two constables, one Walter Stewart and the said William Boyd; that the said cab going towards the east, the prisoner, Jones, and Rutledge were seated on the hind seat of the cab, the prisoner being on the north side, Rutledge on the south side, and Jones between them, the prisoner being handcuffed by his right hand to the left hand of Jones, and Rutledge being handcuffed by his left hand to the right hand of Jones, the constable Walter Stewart being seated on the front seat of the cab, facing Rutledge, and the constable William Boyd being also seated on the front seat, facing the prisoner; that when the cab reached the corner of Gerrard and Sumach streets, an unknown person threw a parcel containing at least two revolvers, and perhaps three, into the cab, through its south window, and Rutledge and the prisoner at least, and perhaps Jones,

having each obtained and armed himself with a revolver, a struggle with the constables ensued, in which the constable William Boyd was shot and killed by one of those whom he had in custody.

The learned Chief Justice in charging the jury said: "I am going to submit to you two propositions. The first and plain issue for you to consider is, whether the hand of the prisoner at the bar fired the fatal shot which undoubtedly deprived William Boyd of his life. If you determine that it was his hand that fired the shot, then you will require to go no further with your investigation of the case, because, as I shall have presently to explain to you, you will necessarily have to find the prisoner guilty of wilful murder. If you think his was not the hand that fired the fatal shot, if you think there is sufficient doubt, reasonable doubt, give the prisoner the benefit of it; it is his right. Then you will pass to the consideration of the second branch, which I will speak of more fully hereafter."

As to the second branch, the learned Chief Justice said: "The second branch of the case is this: if you find either that the fatal shot was not fired by Rice, or that the question whether he did or did not is so surrounded by doubt that you feel yourselves bound to give him the benefit of it, then you will have to go on further and consider another branch of the subject. I shall ask you, when you return, the specific question: Was the fatal shot fired by the hand of the prisoner at the bar? If you answer that, "yes," that is the end of the case. If you say "no," or you are so much in doubt you cannot say whether he did or not, you will have to consider this: you will have to consider the position of the people. Five men leave the court-yard here in a hack; the three prisoners are on trial for a grave offence; the second day of the trial has been reached, and they are being conveyed in lawful custody to the gaol, there to remain and be brought up to court the following morning. Suddenly, at the place mentioned, the corner of Gerrard and Sumach streets, a man comes along and places a parcel in the hack, which is found to contain at least two revolvers. Now, it is argued on the part of the Crown, that could not have been mere accident, that it could not have been the result of some friend doing this thing without any concert with the prisoners; so, it is claimed,

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you may find the prisoner guilty of murder although Rutledge or Jones fired the shot. Now, when men go out with a common intent to commit a felony, and in the pursuit of that unlawful purpose death ensues, it may or may not be murder on the part of those who do not actually strike the fatal blow. If three persons go out to commit a felony, and one of them, without the knowledge of the others, puts a pistol in his pocket and commits murder, the other two would not be guilty of it; but where all the parties proceed with the intention to commit an unlawful act and with the resolution or determination to overcome all opposition by force, if, by reason of such resolution, one of the party is guilty of homicide, his companions would be liable to the penalty which he has incurred. Now, we must be careful not to push that doctrine too far against the prisoner. I am bound to tell you there is no evidence on which you could convict him of conspiracy up to the time the parcel was placed in the cab; the Crown is bound to prove if such was the case. I will relieve you of that part of it. I will tell you there is no evidence up to that time; there is no evidence of conspiracy or common design up to the moment the parcel is thrown into the cab. Yet if, at that moment, before the shot was fired that killed Boyd, the prisoners resolved to escape from lawful custody that they were in, then each would be responsible for the acts of the other; so that, in that point of view, if you reach that conclusion, then Rice would be deemed to be guilty, even although Jones or Rutledge fired the fatal shot. You will recollect that Stewart swore that soon after the parcel came in he saw a revolver with Rice, and he was told to "give up" or "get out;" that Rutledge said "give it to him;" that Rice said to him to "give up." If that is true, there would be evidence of common design. But, as I have said before, I shall ask you to make a specific finding whether Rice did fire the shot that killed Boyd."

After retiring to consider their verdict, the jury returned into Court, and stated that they wished to know definitely what the learned Chief Justice had said on the subject of conspiracy or collusion; and he then said to them: "I told you, gentlemen, there was no evidence upon which you could find that there was a conspiracy or collusion between the three prisoners up to

the time the parcel was placed or thrown into the cab; but, granting there was no evidence of conspiracy or common design up to the moment the parcel was thrown into the cab; yet if, at that moment, or at any time up to the time of the shooting of Boyd, the prisoners resolved to escape from lawful custody they were in, then each would be responsible for the acts of the other; and, if you find that between the throwing of the parcel and the shooting of Boyd, there was such a resolution, even although Rutledge or Jones fired the shot, the prisoner at the bar can be convicted of murder."

The jury again retired and again returned into Court, when the following took place. The clerk: "Gentlemen, have you agreed on your verdict?" Foreman of jury: "We have." The clerk: "Do you find the prisoner guilty or not guilty?" Foreman of jury: "On the first *count* we disagree." The clerk: "How do you find on the second *count*?" Foreman of jury: "On the second *count* we find the prisoner guilty." His Lordship: "Is there any prospect of your agreeing as to whether he fired the fatal shot or not?" Foreman of the jury: "I think not." And the verdict was recorded, with the consent of the jury given in the usual way, as follows: "The jury find the prisoner guilty. They are unable to agree as to whether the prisoner fired the shot which killed William Boyd."

The learned Chief Justice reserved for our opinion the following questions:—

1. Was there any sufficient evidence to warrant the verdict as found by the jury?

2. Was my direction to the jury on the question of conspiracy or common design, correct?

3. Was the finding of the jury a proper one, or has there been a mistrial?

The case was heard by ARMOUR, C.J O., and OSLER, MACLENNAN, MOSS, and GARROW, JJ.A., on the 30th April, 1902.

T. C. Robinette, for the prisoner. To make each of the three men responsible for the acts of each of the others, there must have been more than a resolution to escape; the three men must have entertained the common purpose of resisting with violence any opposition made to their escape; there could be no

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common design unless all formed the resolve that all three should escape by violence—an independent resolve to escape on the part of each for himself was not sufficient; there is no evidence of a common resolve. [He referred on this branch of the case to the following authorities:—Hawkins P.C., Bk. 1, ch. 13, secs. 51, 52; 1 Hale P.C., p. 439; 4 Bl. Com. (Lewis), p. 200; 1 East P.C. ch. V., sec. 33; Foster's Crown Law, pp. 351-3; *Rex* v. *Jackson* (1749), 18 St. Trials 1069; *Rex* v. *Plummer* (1701), Kelyng 109; *Mansell and Herbert's Case* (1555), 1 Hale P.C. 441; *Rex* v. *Hodgson* (1730), 1 Leach 6; *Tomson's Case* (temp. Car. II.) Kelyng 66: *Rex* v. *Edmeads* (1828), 3 C. & P. 390; *Rex* v. *Collison* (1831), 4 C. & P. 565; *Regina* v. *Howell* (1839), 9 C. & P. 437, 450; *Regina* v. *Lee* (1864), 4 F. & F. 63; *Rex* v. *Hawkins* (1828), 3 C. & P. 392; *Rex* v. *Whithome* (1828), *ib.* 394; *Duffey and Hunt's Case* (1830), 2 Lewin 194; *Macklin's Case* (1838), 1 Lewin 225; *Regina* v. *Price* (1858), 8 Cox 96; *Regina* v. *Franz* (1861), 2 F. & F. 580; *Regina* v. *Luck* (1862), 3 F. & F. 483; *Regina* v. *Caton* (1874), 12 Cox 624; *Regina* v. *Connolly* (1894), 1 Can. Crim. Cas. 468; Bishop's Commentaries on the Criminal Law, secs. 629, 636, 637; *Regina* v. *Serné* (1887), 16 Cox 311; *Regina* v. *Horsey* (1862), 3 F. & F. 287; *Regina* v. *Desmond* (1868), 11 Cox 146; *Regina* v. *Greenwood* (1857), 7 Cox 404; "Constructive Murder," articles in 33 L.J. (1898), pp. 546, 615; Stephen's Digest, 5th ed., p. 32; Roscoe's Criminal Evidence, 12th ed., p. 645; *Sissinghurst Case* (1674), 1 Hale P.C. 461; *Regina* v. *Tyler* (1838), 8 C. & P. 616.] Then, as to the verdict of the jury. There was only one count in the indictment. The murder count is indivisible. The jury stated that they disagreed on the first count, and found the prisoner guilty on the second count. Evidently, what they had in mind, what they meant, was that they disagreed as to whether the prisoner had committed a major offence, and agreed that he was guilty of a minor offence. When the foreman said that the jury disagreed on the first count, the clerk had no right to ask a second question; the indictment was indivisible; the jury could not agree and disagree about it. The verdict was the deliverance of the jury. If it was not entered as it was delivered, the entry was wrong. There was no power to amend the verdict. [He referred

on this branch of the case to the following authorities :—*Wills* v. *Carman* (1888), 14 A.R. 656 ; *Bush* v. *McCormack* (1891), 20 O.R. 497 ; *Stevens* v. *Grout* (1894), 16 P.R. 210 ; *Regina* v. *Virrier* (1840), 12 A. & E. 317 ; *Rex* v. *Keat* (1697), 1 Salk. 47 ; *Bold's Case, ib.* 53 ; *Miller* v. *Trets* (1697), 1 Ld. Raym. 324 ; *Rex* v. *Woodfall* (1770), 5 Burr. 2661 ; *Regina* v. *Farnborough* (1895), 18 Cox 191 ; *O'Connell* v. *The Queen* (1844), 1 Cox 413 ; *Campbell* v. *The Queen* (1847), 2 Cox 463 ; *Regina* v. *Yeadon* (1861), 1 Leigh & Cave 81 ; *Regina* v. *Johnson* (1865), *ib.* 632 ; *Regina* v. *Dudley* (1884), 14 Q.B.D. 273 ; *Rex* v. *Curill* (1773), Lofft 156 ; *Turner and Reader's Case* (1830), 2 Lewin 9 ; *Rex* v. *Bear* (1697), 2 Salk. 646 ; *Regina* v. *Martin* (1839), 9 C. & P. 213 ; *Regina* v. *Mehegan* (1856), 7 Cox 145 ; *Regina* v. *Meany* (1862), 1 Leigh & Cave 213 ; Roscoe's Criminal Evidence, 12th ed., p. 182 ; *Regina* v. *Larkin* (1854), Dears. 365 ; *Regina* v. *Oliver* (1877), 13 Cox 588.] This is a defective verdict ; no judgment can be entered upon it ; and there should be a new trial: *State* v. *Redman* (1864), 17 Iowa 329 ; *Wright* v. *State* (1854), 5 Ind. 527 ; *People* v. *Olcott* (1801), 2 Johns. Cas. (N.Y.) 301 ; *Rex* v. *Huggins* (1730), 2 Ld. Raym. 1574 : *Rex* v. *Hazel* (1785), 1 Leach 368 ; *Regina* v. *Jackson* (1857), 7 Cox 357 ; *Regina* v. *Harrington* (1851), 5 Cox 231.

J. R. Cartwright, K.C., and *Frank Ford*, for the Crown, There is evidence to sustain the verdict. Reading the whole charge, it will be seen that the Judge told the jury just what the prisoner now contends they should have been told ; the direction was entirely proper—and favourable to the prisoner. See Foster's Crown Law, pp. 270, 352. There can be no question as to the sufficiency of the verdict ; it was not defective ; if the finding was informal the verdict was entered according to the meaning of it, and was read over to the jury, who assented to it, and it became their verdict. [They referred on this question to Am. & Eng. Encyc. of Law, 1st ed., tit. "Verdict ;" *Hawks* v. *Crofton* (1758), 2 Burr. 698 ; *Regina* v. *Sparrow* (1860), Bell C.C. 298 ; *Regina* v. *Crawshaw* (1860), *ib.* 303].

Robinette in reply.

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May 29. ARMOUR, C.J.O. (after stating the facts as above):—I am of the opinion that there was sufficient evidence to warrant the verdict as found by the jury; that the direction of the learned Chief Justice to the jury on the question of conspiracy or common design was not one of which the prisoner could complain; that the verdict of the jury was a proper one; and that there was no mistrial.

The law is, that "if several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose:" Criminal Code, sec. 61, sub-sec. 2.

And culpable homicide is murder in the following case: "If the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one:" Criminal Code, sec. 227, sub-sec. (*d.*)

Culpable homicide is also murder in the following case, whether the offender means or not death to ensue, or knows or not that death is likely to ensue: If he means to inflict grievous bodily injury for the purpose of facilitating his escape from lawful custody, and death ensues from such injury: Criminal Code, sec. 228 (*a.*) and sub-sec. 2.

The evidence shewed that immediately upon the parcel containing the revolvers being thrown into the cab the prisoner and Rutledge, at all events, and perhaps Jones, armed themselves with the revolvers and formed the common intention of, by the use thereof, prosecuting the unlawful purpose of escaping from lawful custody, and of assisting each other therein, and that the shooting by one of them of Boyd was an offence committed by one of them in the prosecution of such common purpose, and that the commission thereof was or ought to have been known to have been a probable consequence of the prosecution of such common purpose. Each of them was, therefore, a party to such offence, and the offence, being murder in the actual perpetrator thereof, was murder in the prisoner, even if he was not

the actual perpetrator thereof, and he was properly found guilty by the jury of that offence, the evidence, in my opinion, fully warranting their verdict.

There was nothing, in my opinion, in the charge of the learned Chief Justice, nor in his subsequent instruction to the jury, both of which must be read together, of which the prisoner could properly complain.

The jury in coming into Court, and their foreman saying, "On the first count we disagree," and being asked by the clerk, "How do you find on the second count?" saying, "On the second count we find the prisoner guilty," were obviously referring to the two propositions or branches of the case submitted to them by the learned Chief Justice.

Their verdict must, however, be taken to be the verdict recorded by the learned Chief Justice on the back of the indictment, and acknowledged by the jury to be their verdict, in these words: "The jury find the prisoner guilty. They are unable to agree as to whether the prisoner fired the shot which killed William Boyd:" *Regina* v. *Meany*, 1 Leigh & Cave 213.

The finding of the jury was, therefore, a proper one, and there was no mistrial.

The conviction will therefore be affirmed.

OSLER, J.A.:—The prisoner has been found guilty of murder —constructive murder, as it is called— a phrase which has no legal meaning, but is a common and convenient way of describing a homicide committed under circumstances which in law constitute the offence of murder, though the particular act which occasioned it may not have been actually done or directly authorized by the accused.

The questions reserved by the learned trial Judge are:—

1. Whether there was sufficient evidence to warrant the verdict as found by the jury.

2. Whether his direction to the jury on the question of "conspiracy" or common design was correct.

3. Was the finding of the jury correct, or had there been a mistrial?

I have carefully considered the charge of the learned Judge and the evidence bearing thereon and the proceedings at trial

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as reported by him for the purpose of and forming part of the case reserved.

The whole of the evidence at the trial, as taken by a stenographer, has been handed in by counsel for the prisoner, but I have not thought it right to refer to it, as no part of it was proposed to be read on the argument, and it is no part of the case returned by the trial Judge, and was not called for or ordered by this Court to be procured or produced for the purpose of the case. There is nothing regularly before us but the case reserved as settled and signed by the Judge, and to that, in dealing with the evidence and questions submitted by him, I confine myself.

No doubt seems to have been raised at the trial but that the shot which killed the unfortunate constable was fired either by the prisoner or by one of his companions. The jury, however, were unable to agree that it was fired by the prisoner himself.

The question then was—the offence being clearly murder in the person who fired the shot, under sec. 227 or 228 of the Code —whether the evidence was sufficient to bring the prisoner within sec. 61 (2) of the Code: "If several persons form a common intention to prosecute *any unlawful purpose*, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or *ought to have been known to be a probable consequence* of the prosecution of such common purpose."

Sections 227 and 228, so far as they are material, may be referred to:—

Section 227: "Culpable homicide is murder in each of the following cases: (*a.*) If the offender means to cause the death of the person killed; . . . (*d*) If the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one."

228: "Culpable homicide is also murder in each of the following cases, whether the offender means or not death to ensue, or knows or not that death is likely to ensue: (*a*) If he means to inflict grievous bodily injury for the purpose of facilitating

the commission of any of the offences in this section mentioned, or the flight of the offender upon the commission or attempted commission thereof, and death ensues from such injury ; . .

"2. The following are the offences in this section referred to :" —*inter alia*—" escape or rescue from prison or lawful custody."

The unlawful purpose in which it was said that the prisoner and his companions were engaged was that of escaping from lawful custody (sec. 164), or possibly prison-breaking under sec. 161 of the Code : as to which see sec. 3 (*u*) ; 1 Hale P.C., p. 609 ; Hawkins P.C., Bk. 2, ch. 18, sec. 4.

The Code, in abolishing the useful distinction between felonies and misdemeanours, removes the distinction in the quality of an escape as an offence dependent upon that of the offence for which the prisoner effecting it was confined.

Briefly stated, the evidence shews that the prisoner and his two companions, Rutledge and Jones, were on the day of the commission of the murder undergoing their trial at the general sessions of the peace for the county of York for the offence of burglary, and that, the court having been adjourned and the trial continued until the following day, they were being conveyed back to the county gaol in a cab in the custody of two county constables, Stewart and Boyd ; the constables being seated on the front seat, and the prisoners facing them on the other. The prisoner Jones sat between his fellows, and the three were shackled together, Rice to Jones's left hand, and Rutledge to Jones's right hand. On their way to the gaol a person unknown threw into the cab a parcel which proved to contain at least two revolvers. Rutledge seized one of them, and a struggle began between him and constable Stewart, who sat opposite to him, and the other got into the possession of the prisoner Rice. The struggle in the cab continued, and in the course of it constable Boyd was killed. There was evidence of action on the part of the prisoner Jones in raising himself upwards and forwards from his seat, from which it might be inferred that he was aiding Rutledge to pass a pistol underneath or behind him to Rice. Stewart swore that soon after the parcel came in he saw a revolver with Rice, and he (Stewart) was told to "give up" or "get out;" that Rutledge said "give it to him," and Rice said to him to "give up."

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The learned Judge told the jury that if they found that the fatal shot was fired by the prisoner it was unnecessary for them to consider the case further, and then proceeded to explain to them the law on the subject of common intent or design as affecting the prisoner, in case they were unable to agree that his was the hand which actually fired the shot. He told them that when all parties proceed with the intention to commit an unlawful act—*sc.*, to effect their escape from lawful custody—and with the resolution or determination to overcome all opposition by force, if by reason of such resolution one of the party is guilty of homicide, his companions will be liable to the penalty which he has incurred. He warned the jury that the doctrine must not be pushed too far against the prisoner, and told them that there was no evidence of "conspiracy" or common design on the part of the three up to the moment of the parcel being thrown into the cab. "Yet," he added, "if at that moment, before the shot was fired that killed Boyd, the prisoners resolved to escape from the lawful custody they were in, then each would be responsible for the acts of the other, so that, in that point of view, if you reach that conclusion, then Rice would be deemed to be guilty even although Jones or Rutledge fired the fatal shot."

After the jury had been out for some time, they came into Court and desired to know definitely what had been said on the subject of "conspiracy or collusion," and the learned Judge again directed them in terms much the same as those I have already quoted.

Looking at the charge as a whole, so far as it dealt with the subject, it appears to me that the learned Judge's direction may be upheld.

We find the law thus laid down in Hawkins P.C., Bk. 1, ch. 13, sec. 51: "Where divers persons resolve generally to resist all opposers in the commission of any breach of the peace, and to execute it in such a manner as naturally to raise tumults and affrays . . . and in so doing happen to kill a man, they are all guilty of murder; for they must at their peril abide the event of their actions who wilfully engage in such bold disturbances of the public peace, in open opposition to, and defiance of, the justice of the nation." "But," he adds, "in such

case the fact must appear to have been committed strictly in prosecution of the purpose for which the party was assembled:" sec. 52.

And in Foster's Crown Law, p. 351, sec. 6: "If the fact, *i.e.*, fact amounting to murder, was committed in the prosecution of the original purpose, which was unlawful, the whole party will be involved in the guilt of him who gave the blow. For in combinations of this kind the mortal stroke, though given by one of the party, is considered in the eye of the law, and of sound reason too, as given by every individual present and abetting. The person actually giving the stroke is no more than the hand or instrument by which the others strike."

Ib., sec. 7: "I have, by way of caution, supposed that the murder was committed in prosecution of some unlawful purpose, some common design, in which the combining parties were united, and for the effecting whereof they had assembled."

Cases which illustrate these propositions are: *Rex* v. *Edmeads*, 3 C. & P. 390; *Rex* v. *Hawkins*, *ib.* 392; *Rex* v. *Collison*, 4 C. & P. 565; *Rex* v. *Jackson*, 18 St. Trials 1069; *Rex* v. *Hodgson*, 1 Leach 6; *Regina* v. *Skeet* (1866), 4 F. & F. 931; *Regina* v. *Luck*, 3 F. & F. 483. I may also note the celebrated case, to which I referred on the argument, of *Regina* v. *Martin and others*, the Fenians tried by special commission at Manchester in November, 1867, for the murder of constable Brett in effecting the escape of other Fenians while being conveyed to gaol in his custody. Mellor, J., in charging the jury in that case said: "If several persons agreed to rescue prisoners at any risk, and with any amount of violence and force which might be necessary for the accomplishment of their design, and were armed with deadly weapons likely to enable them to accomplish their design, they were each and all guilty of the crime of wilful murder:" The Times, Nov. 7, 1867.

Section 61 (2) of the Code, which was not referred to at the trial or on the argument before us, I have already quoted: and very close to it is the following passage from Russell on Crimes, 6th ed., vol. 1, pp. 188-9, where the writer, after a discussion of the authorities, says: "It is submitted that the true rule of law is that where several persons engage in the pursuit of a common unlawful object, and one of them does an act which the others

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ought to have known was not improbable to happen in the course of pursuing such common unlawful object, all are guilty."

The evidence was clear, if the jury believed it, that all three prisoners ascertained, immediately after the parcel was thrown into the cab, that it contained weapons, and, however hopeless it may now seem to have been that persons situated as they were could effect their escape, the evidence is that Rice and Rutledge, Jones aiding and assisting them, did at once proceed to possess themselves of the pistols, and by their language and actions and use of the weapons endeavour to overpower and overawe the constables. That this was done for the common purpose of effecting their escape, their language and behaviour in the cab indicated. It is not necessary to lay stress on what occurred afterwards, as they were all shackled together, but they all got out of the cab and on to the street car, the control of which Rice and Rutledge attempted to secure. There is no evidence that any one of the three attempted, so far as his shackled condition would permit, or by his language, to dissociate himself from the others. The contrary expressly appears.

The learned counsel for the prisoner pressed upon us that the learned Judge had not sufficiently instructed the jury as to what was necessary to constitute a common purpose or intention, and that there was nothing more than the individual intention on the part of each prisoner arising out of the circumstances of the moment—in other words, that no common design to effect an unlawful purpose was proved. As to this I see nothing wrong or insufficient in the charge. The common design might certainly be formed as soon as the prisoners found that weapons suitable as means of effecting an escape were in their possession; and the evidence, as reported in the case, supports the inference that there was a common design to effect an unlawful purpose by violent means.

It was also urged that the Judge had not laid sufficient stress upon the element of necessity for proof that the prisoners had resolved to incur all risks and to use any amount of violence necessary to accomplish their design—the language which is found in the cases which precede the Code. It would have been more satisfactory if the learned Judge's attention had

been called to the 61st section of the Code, and his direction had been framed with reference to its language. There is, however, no formula, and the law is sufficiently expressed, and more favourably to the prisoner, in the phrase which the learned Judge did use, viz., that the jury were to consider whether there was a common resolution to overcome all opposition by force.

On the whole, I am unable to say that there was any error in the charge, or that there was not sufficient evidence to warrant a verdict affixing the guilt of murder on the prisoner Rice, although the shot may have been actually fired by his companion.

The first and second questions must, therefore, be answered in the affirmative.

As regards the third question, I cannot entertain a doubt that the finding of the jury—that is, their finding as entered and assented to by them, which is, I suppose, what is referred to in this question—was correct, and that there has been no mistrial.

The case was left to them in two aspects: first, whether they were satisfied or not upon the evidence that the shot which killed Boyd was fired by the hand of the prisoner. If it was not, or if they could not agree, then they were to deal with the question of common resolution or intention, and if they found that such existed, they might find the prisoner guilty, although he did not fire the shot. When the jury returned into Court with their verdict, and were asked by the clerk the usual question, the foreman answered: "On the first count we disagree." The clerk, continuing the mistake, then asked them: "How do you find on the second count?" To which the foreman replied: "On the second count we find the prisoner guilty." There was only one count; and the verdict was thereupon entered, and assented to by the jury, thus: "The jury find the prisoner guilty. They are unable to agree as to whether the prisoner fired the shot which killed William Boyd."

The language of the jury in first announcing their findings must be construed with reference to the subject-matter of the charge and what was left to them. They evidently meant to dispose of the two subjects which had been presented for their consideration, which they and the clerk erroneously spoke of as

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"counts." But the mode in which the verdict was actually entered, and the jury's assent to it as entered, cured any inaccuracy of expression which had up to that moment occurred, and nothing now appears upon the record but a verdict in due form. Had the jury insisted upon adhering to their error, or had the verdict been entered in the way they at first mistakenly announced it, very different considerations might have arisen. As it is, the cases of *Rex* v. *Woodfall*, 5 Burr. 2661, *Regina* v. *Virrier*, 12 A. & E. 317, *Regina* v. *Sparrow*, Bell C.C. 298, and *Regina* v. *Crawshaw*, *ib.* 303, shew that the prisoner has nothing to complain of in this respect, and that there is no irregularity or defect in the proceedings.

The third question must be answered as to the first part thereof in the affirmative, and as to the second in the negative. And, as no legal fault can be found with the conviction, the prisoner's trust must be placed in the justice and clemency of the Crown.

MACLENNAN, MOSS, and GARROW, JJ.A., concurred.

Conviction affirmed.

E. B. B

[FALCONBRIDGE, C.J.K.B.]

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March 27.

SPECIAL CASE.

Will—Devise of Hotel Premises to Widow for Life—Transfer by License Commissioners of License to Widow—Absolute Right of Widow thereto—Devise of Estate between Widow and Children.

A testator by his will devised certain real estate consisting of hotel premises to his wife during widowhood for the benefit of herself and four children, the income to be applied for their support and maintenance until the children became of age and in case of daughters until marriage. On the widow marrying the property was to go to the children, the widow being paid $1000. On the testator's death in 1896, the widow applied to the License Commissioners and obtained a transfer of the license to her for the remainder of the year, and for the subsequent years until 1900 the license was granted to her, she carrying on the business and maintaining herself and children thereout, no money of the estate going into the business.

Held, that after the testator's death the license and goodwill of the hotel business belonged to the widow personally, and formed no part of his estate; and apart therefrom the income was divisible amongst the widow and children as directed in *Allen* v *Furness* (1892), 20 A.R. 34.

Held, also, that creditors of the widow were entitled to attach the widow's interest in the property which could be reached by the appointment of a receiver.

THIS was a special case stated in an action brought by the plaintiffs, creditors of Margaret Macfarlane, against the said Margaret Macfarlane.

The facts set out in the case, so far as material, were as follows:—

1. Francis Macfarlane was the owner in fee simple of certain lands and premises in the township of York.

2. He died on the 11th February, 1896, having made a will of which probate was granted out of the surrogate court of the county of York to Neil McLean, of the city of Toronto, esquire, and his wife Margaret Macfarlane, the executor and executrix appointed by the said will. He directed his executors to pay all his just debts, testamentary and funeral expenses, out of the estate. He gave, devised and bequeathed to his son William a house and premises on the said lot, but on the express condition that the lands and premises should not be used for the term of ten years after his decease for hotel purposes, etc. He directed that the rest and residue of his real estate be sold by

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his executors as soon after his death as possible for the best price obtainable therefor, excepting the premises then occupied by him, known as the Fairbank Hotel, which composed part of said lot, which he gave to his wife Margaret Macfarlane, so long as she remained his widow, for the "benefit of herself and my four younger children—John, Agnes, Jessie and Mabel—with full power to my said executor and executrix to sell or lease the same as they may think best, and to execute all leases or conveyances thereof, or of any other of my said lands. The income arising from the leasing or selling of the said hotel premises and other lands to be applied in support and maintenance of my said wife and my said four younger children until my said four children shall each attain the age of twenty-one years; or in case of my daughters, until their marriage, should such occur before they arrive at the age of twenty-one years. My said son John shall not be entitled to support and maintenance out of my estate after he attains the age of twenty-one years, unless he becomes mentally or physically unable to earn his own livelihood." He directed that all moneys that might remain after the payment of his debts as aforesaid should be invested by his executors on the security of mortgage on real estate, or any other security that to them, his said executors, might seem good and sufficient. Should his wife marry again or die, then he directed that the proceeds of his estate, after the payment of $1000 to his wife in the event of her marrying again (which should be in lieu of all dower, or claim to dower in his said estate) should be divided equally among his four younger children, or the survivors of them.

3. In addition to the real estate devised by the will, the testator at the time of his death left personal estate amounting to $1,712.33, of which $1,237.33 was cash on hand and in the bank; the other personal estate amounted to $475. The personal assets, with the exception of some household furniture, valued at about $120, part of which was included in a sale to one James O'Leary hereinafter referred to, were realized on by the executors, and applied by them in payment of funeral expenses, claims of creditors, and costs of administration.

4. By an order of the Court, dated the 6th December, 1899, John A. McDonald was appointed executor in the place of the said Neil McLean.

5. The testator left him surviving his wife, Margaret Macfarlane, and five children, viz., John Macfarlane and Mary Agnes Fussel—now of the full age of twenty-one years, but who at the death of the said Francis Macfarlane were under the age of twenty-one years—and Jessie May Macfarlane and Mabel Isabella Macfarlane, who were still infants, but who would be twenty years of age on the 10th August, 1902. His son William Macfarlane was of the full age of twenty-one years, and was not interested in the matters herein.

6. For some years prior to the death of Francis Macfarlane he carried on an hotel business in the said Fairbank Hotel, and the license commissioners of West York had granted to him a tavern license for the said premises.

7. On the 23rd April, 1895, the license commissioners granted to him a tavern license for the year commencing 1st May, 1895.

8. In February, 1896, after the death of Francis Macfarlane, the executors applied to the license commissioners for a transfer to Margaret Macfarlane of the license, which was granted.

9. Margaret Macfarlane paid nothing to the estate for the transfer, and the government fee was paid by her out of the receipts of the said tavern.

10. After the transfer, Margaret Macfarlane carried on the hotel business on the premises for the balance of the current year, and in each succeeding year made application for and obtained a new license in her own name for the premises, for which she paid nothing to the testator's estate, and continued to carry on the business on the premises until the 20th May, 1901, when she gave up possession of premises to the said James O'Leary, who became the purchaser thereof.

11. During all the time Margaret Macfarlane carried on the hotel business on the premises she maintained herself and four infant children out of the receipts from the business.

12. Whilst Margaret Macfarlane carried on the business she purchased goods, principally liquors and cigars, from time to

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time from the plaintiffs, which were used by her in connection with business, and the amount owing by her to the said creditors was about $4000. Margaret Macfarlane did not carry on the business successfully, and all the goods sold to her by the said creditors had been sold and disposed of by her, and she had no assets or means (save what she might be entitled to out of the proceeds of the sale to the said O'Leary) out of which she could pay any of the claims of her creditors or any part thereof.

13. In March, 1901, an agreement was entered into by the executors for the sale of the hotel premises to the said James O'Leary for $6,500. In making the agreement it was the intention of all parties that the purchase price of $6,500 should cover and include the license, goodwill and furniture of the hotel, and, in carrying out the sale, an application was made to the license commissioners of West York for the transfer of the license to the said James O'Leary, upon hearing of which the creditors appeared before the license commissioners and objected to the transfer being allowed unless some provision was made for payment of their claims, and the said license commissioners, after hearing all parties, decided to withhold their consent to such transfer until some satisfactory arrangement was made with the creditors. In order to obtain such assent an agreement was entered into dated 3rd July, 1901, between Margaret Macfarlane and John A. McDonald as trustees of the estate of Francis Macfarlane of the first part; the said Margaret Macfarlane of the second part; the several persons, firms and corporations, being creditors of Margaret Macfarlane, of the third part; the National Trust Company, Limited, of the fourth part; and John Macfarlane, Mary Agnes Fussel, and the adult children of the said Francis Macfarlane of the fifth part. The said agreement, after reciting the death of Francis Macfarlane, and of Margaret Macfarlane having obtained a transfer of the license and of her carrying on the business and contracting the said debts, and of proceedings having been taken by the creditors to recover the amount of their claims and of the contract of sale made between Margaret Macfarlane and James O'Leary, and that it was impossible to carry out the sale

without the consent of the creditors, and that the agreement had been entered into for the purpose of carrying out the sale, the agreement witnessed that the said lands and premises were conveyed and assigned over to the company upon trust to carry out the contract of sale and to convey the said property to the said James O'Leary, part of the purchase money to be paid in cash and the balance by a mortgage on the said hotel property and the conveyance to the company of certain property in the city of Toronto. The hotel property was to be at once conveyed over to the said James O'Leary, and the company were to hold the proceeds thereof for six months, and in case an action were commenced within that period to test the rights of the parties to the said agreement, they were to hold the property until the termination thereof, when it should forthwith be distributed to the persons found entitled thereto.

14. The sale of the hotel business, license and goodwill to James O'Leary were subsequently carried out by the company, and they received and held upon the trusts of the agreement the cash, mortgage and real estate already referred to.

The questions submitted to the Court were:—

(*a*) Whether at the time of the above mentioned agreement for sale to James O'Leary the license to sell liquor upon the said premises and the goodwill of the hotel business, or either of them, belonged to the defendant Margaret Macfarlane personally or to her as trustee for the estate of the late Francis Macfarlane.

(*b*) What interest, if any, the defendant Margaret Macfarlane had in the said premises or license or goodwill of the said business, or the proceeds from the sale thereof, under the will of the late Francis Macfarlane.

(*c*) If it should be held that the said license and the goodwill of the said hotel business, or either of them, belonged to the defendant Margaret Macfarlane personally, then it is agreed by the parties hereto that a reference shall be directed to ascertain what portion of the purchase money of $6,500 paid by the said James O'Leary is applicable to the said license or goodwill, or either of them.

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(*d*) If it should be held in answer to question (*b*) that the defendant Margaret Macfarlane was entitled to any interest under said will, then could a creditor of the said Margaret Macfarlane by any procedure reach said interest to satisfy his execution?

(*e*) Such further questions or enquiries, as may be germane to the preceding questions, or may be necessary to fully determine the rights of the parties.

It was agreed between all parties thereto that when the above questions had been determined, such order might be made by the Court as might be necessary to carry out the agreement between the parties thereto, as expressed in the trust deed thereto attached.

On the 27th March, 1902, the special case was argued before FALCONBRIDGE, C.J., sitting in the Weekly Court.

C. H. Ritchie, K.C., for the plaintiffs. The license and goodwill in the tavern business belonged to the widow personally and formed no part of the testator's estate. There is no provision in the License Act, R.S.O. 1897, ch. 245, which authorizes executors to take over a tavern license and carry on an hotel business. No fiduciary relationship existed. The wife was not a constructive trustee for the benefit of the estate: *Lister* v. *Stubbs* (1890), 45 Ch. D. 1. Then as to the property apart from this, the income derivable therefrom is to be applied in the support and maintenance of the wife and four younger children until the children should become of age. The principle on which the income is to be divided is laid down in the case of *Allen* v. *Furness* (1892), 20 A.R. 34, namely, it is to be divided into aliquot parts to represent each, so that there will be one share for the wife and one for each of the children. Two of the children are now of age, so that there are only now two infants, and until they become of age the income must be divided into three parts, one part for the widow and two parts for the children. On the children coming of age, the whole income goes to her. The creditors are entitled to the wife's interest in the income. This can be done by the appointment of a receiver.

A. C. McMaster, for the adult beneficiaries and executors. The intention of the testator, as expressed in his will, is that the license and goodwill should be held as part of his estate. The widow, therefore, in taking over the hotel business and acquiring the license, did so for the benefit of the estate: Lewin on Trusts, 10th ed., p. 192; *Wakefield* v. *Wakefield* (1899), 32 O.R. 36, affirmed on appeal (1901), 2 O.L.R. 33. The License Act does not preclude the relationship of trustee. Section 40, however, seems to contemplate the transfer of the license to the legal representatives: Williams on Executors, 9th ed., vol. 2, p. 1901. Then as to the property apart from the goodwill and license. Under the terms of the will the interest of the children is not limited to minority or while unmarried. The intention of the testator was that the children, with the exception of John, should be entitled to maintenance so long as they required it; a trust is created in their favour which the Court will enforce: *Booth* v. *Booth*, [1894] 2 Ch. 283. The Court should only allow the creditors such part of the income as would be allowed to an annuitant for life. In any event they are entitled to maintenance during minority, as laid down in *Allen* v. *Furness*, 20 A.R. 34.

D. L. McCarthy, for the infants. No matter in what capacity the widow took the property, the Court will see that the interests of the infants are protected, and that a sufficient sum is set apart to provide for their support and maintenance. The goodwill of the hotel formed part of the testator's estate—an hotel business may be the most valuable asset of a testator's estate. The testator evidently thought so here, and he intended it to be taken as part of his estate, and the license was taken by the widow as representing his estate: *Llewellyn* v. *Rutherford* (1875), L.R. 10 C.P. 456; *Booth* v. *Curtis* (1869), 17 W.R. 393; *Rutter* v. *Daniel* (1882), 46 L.T.N.S. 684; Talbot on Licensing, pp. 31, 37; Jarman on Wills, 5th ed., vol. 2, pp. 372-3.

W. E. Raney, for the National Trust Company.

March 27. FALCONBRIDGE, C.J.:—No money of the estate went into the business which the widow carried on for her own benefit. There is no provision in the statute allowing an executor or trustee to carry on the business, which, with the

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license, is personal to the holder thereof: see the Liquor License Act, R.S.O. 1897, ch. 245, secs. 11, 12, 16, 37, 40. There is no pretence that the business was the property of the estate of the testator. There can be no conflict of interest and duty in the widow's position, inasmuch as there is no possibility of the beneficiaries getting any advantage out of it; nor is there any constructive trust. I refer to Theobald on Wills, 4th ed., 604; *Allen* v. *Furness*, 20 A.R. 34; *Lambe* v. *Eames* (1871), L.R. 6 Ch. 597; *Lister* v. *Stubbs*, 45 Ch. D. 1; *East* v. *O'Connor* (1901), 2 O.L.R. 355.

The license system in England is so different from ours that the English authorities and cases have, for the most part, no application.

The following is the result:—

(1) At the time the agreement for sale was entered into with James O'Leary, the license to sell liquors and the goodwill of the hotel business belonged to the defendant Margaret Macfarlane personally.

(2) Under the will of Francis Macfarlane, the defendant Margaret Macfarlane is entitled to receive, during her lifetime or until she shall marry again, the income arising from the proceeds of the sale of the real estate, exclusive of the value of the license and goodwill of the hotel business. The two infant defendants are entitled to maintenance out of the income until they reach twenty-one years of age; and until that period is reached, the income should be divided as directed in *Allen* v. *Furness*, 20 A.R. 34.

If the defendant Margaret Macfarlane shall marry again, she will be entitled to receive $1,000; and the balance of the estate will be divisible equally among her four children, parties defendant.

(3) There will be a reference to the Master to ascertain what portion of the purchase money paid by James O'Leary represented the value of the license and goodwill of the business.

(4) An execution creditor of the defendant Margaret Macfarlane could reach her interest under the will of Francis Macfarlane, by procuring the appointment of a receiver.

(5) There will be an order directing the defendants, The National Trust Company, Limited, to distribute the money and securities in their hands in accordance with the terms of the trust deed, having regard to the above declarations.

G. F. H.

[MEREDITH, J.]

THE PEOPLE'S BUILDING AND LOAN ASSOCIATION v. STANLEY.

1902
June 27.

Execution—Motion for Leave to Appeal—Costs of—High Court—Authority to Issue Execution.

An application to a Judge of the Court of Appeal for leave to appeal from an order of a Divisional Court having been dismissed with costs, the same were taxed and a certificate issued, which, with the order of dismissal, was filed in the High Court, and a *fi. fa.* issued to levy the amount of such costs placed in the sheriff's hands :—

Held, that the order directing payment of costs was properly made under secs. 77 and 119 of the O.J. Act; and that execution was properly issued out of the High Court under Rule 3, by analogy to the procedure under Rule 818.

THIS was a motion to set aside a writ of *fieri facias* against the goods and chattels of the defendant on the grounds set out in the judgment.

The motion was heard before MEREDITH, J., at the Weekly Court at London, on the 24th June, 1902.

W. H. Bartram, for the motion.

J. O. Dromgole, contra.

June 27. MEREDITH, J.: — The defendant applied to a Judge of the Court of Appeal for leave to appeal to that Court from an order of a Divisional Court; the application was dismissed with costs; the costs were taxed and a certificate given; and the order dismissing the application was entered, and the certificate was filed, in the office in which the action was commenced, and thereupon a *fi. fa.* was issued out of this Court, from that office, to levy such costs, and was placed in the hands of the sheriff, to whom it was directed, for execution.

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The defendant now moves to set aside that writ on the grounds, as stated upon the argument, (1) that there was no power to make the order for payment of costs, and (2) that there was no right to issue the writ out of this Court.

Mr. Bartram's argument upon the first ground was, that the Court of Appeal never became seized of the case, as there was no appeal but merely an application for leave to appeal, and, therefore, had no power to make any order; that it is only when there is an appeal to that Court that it can make any judgment or order.

But by sec. 77 of "The Judicature Act" R.S.O. 1897, ch. 51, the defendant's application was expressly authorized, and power is given to the Court or a Judge to grant, in certain cases, or to refuse the leave applied for; and by sec. 119 of the Act, subject to rules of Court, and to the express provisions of any statute, the costs of, and incidental to, all proceedings in the Supreme Court of Judicature are in the discretion of the Court or Judge, and the Court or Judge has full power to determine by whom and to what extent such costs shall be paid; and part of rule 1130 is to the same effect.

These sections give the statutory power required to support the order.

The other ground is one affecting the mode of procedure by which the order can be regularly enforced only.

Under sec. 55 of the Act, the Court of Appeal has the like power, authority and jurisdiction as is, by the Act, vested in the High Court for the purpose, among other things, of enforcing any judgment or order made on an appeal, and for the purpose of any other authority given to the Court of Appeal by the Act.

This section seems to expressly give power to that Court to issue execution, but, as decided in *Lowson* v. *Canada Farmers' Mutual Ins. Co.* (1883), 8 A.R. 613, its effect is controlled by rule 818, which provides the appropriate procedure for enforcing judgments and orders of that Court in the High Court.

Rule 818, however, does not seem to be expressly applicable to this case. The decision of the Court of Appeal, mentioned in it, is a decision upon an appeal, and there does not seem to be any direct provision respecting the somewhat extraordinary

procedure of an application, made under sec. 77 of the Act, for leave to appeal. Chapter XIII. of the rules does not seem to throw any light upon this question.

But, under rule 3, by analogy to the procedure under rule 818, execution may, I think, be rightly issued in the High Court to enforce payment of such costs as those in question, in the manner provided for in the latter rule.

No objection is made as to the form, or for want, of the certificate provided for in the rule; if there had been, and if the certificate had been wanting or irregular, it might be supplied or amended, being a matter of form only.

The motion is dismissed with costs fixed at $5.

A stay of the execution is asked for pending an appeal from my ruling. An order to that effect may go, if desired, upon payment to the sheriff of the amount to be levied, including sheriff's fees, etc., to abide the result of the appeal.

G. F. H.

[BOYD, C.]

BROWN v. THE CORPORATION OF THE CITY OF HAMILTON.

1902
April 14.

Municipal Corporations—By-law Against Setting Off Fireworks on Streets—Non-liability of Corporation to see to its Enforcement.

The passing by a municipal corporation under the powers conferred by the Municipal Act of a by-law prohibiting the setting off of fireworks, fire crackers, etc., on the public streets does not cast any duty on the municipality to see to its enforcement.

THIS was an action brought by the plaintiff to recover damages against the defendants for an injury sustained by the plaintiff through an alleged breach of a by-law prohibiting the setting off of fireworks and other combustibles on the public streets.

The action was tried before BOYD, C., and a jury at Hamilton on 4th April, 1902.

John G. Farmer, and *J. P. Stanton*, for the plaintiff.

F. MacKelcan, K.C., for the defendants.

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The plaintiff, who resided in the city of Hamilton, had been to Toronto. He returned on the 5th November, 1900, and on reaching the railway station he boarded a street car for the purpose of being carried to his place of residence. There was a political demonstration on the same day, and a procession through the streets, which were lined with people, which impeded the passage of the street cars. The car in which the plaintiff was seated kept ahead of the procession, which followed closely behind it. Roman candles and other fireworks were discharged along the route by those who were marching in the procession. When opposite the city hall the plaintiff came out on the rear platform of the car and stood there watching the procession and the display of fireworks, and while doing so was struck in the eye by a Roman candle fired by some one in the crowd, and seriously injured.

The by-law in question was passed on 7th December, 1874, and had been in force ever since. It enacted "that no person shall fire any cannon, gun, or fire or explode any squib, rocket, crackers, Roman candle or other combustible fireworks in any public street, lane, alley or sidewalk, or other public place within the city."

The provisions of the by-law had, since its enactment, never been enforced on public holidays such as the Queen's Birthday, Dominion Day, etc., nor on occasions of civil and political demonstrations; the municipal authorities had never, however, by means of a license or otherwise expressly sanctioned its being disregarded.

The plaintiff claimed that it was the duty of the defendants to protect him and the public while they were lawfully using the streets, and that by their failure to do so they were liable for the damage sustained by the plaintiff.

The defendants denied that there was any such duty imposed on them; and contended that the plaintiff, by moving from his seat in the car and standing on the platform, had voluntarily incurred the risk of being struck by the fireworks which were being exploded around him.

It was left to the jury to find the amount of damages in case the plaintiff was held entitled to recover, the question of

liability being reserved as a question of law. The jury assessed the damages at $700.

The learned Chancellor subsequently delivered the following judgment:—

April 14. BOYD, C.:—The city of Hamilton, under the authority conferred by the Municipal Act, passed a by-law forbidding the setting off of fireworks in the public streets. This by-law was in force at the time the injury to the plaintiff occurred by the discharge of a Roman candle held by some one taking part in a public procession.

The passing of this by-law as to fireworks by the city was an exercise of the delegated sovereign powers entrusted to municipalities. This function is one of discretionary exercise —the city is free to enact or not to enact; and having enacted, may repeal without any responsibility which can be examined by the courts.

Having enacted such a by-law, there is no duty cast on the municipality to see to its enforcement. That rests with any one or every one in the locality who desires to have it carried into effect: *Back* v. *Holmes* (1887), 56 L.T.N.S. 713. But, like all prohibitory laws, if the popular sentiment is not in its favour, it will prove a dead letter. Such appears to be the fate of this by-law. Though enacted in 1874, and continued ever since as one of the existing by-laws of the city, it has been perhaps periodically violated once a year, or as occasions of political and civil rejoicing and demonstration arose, if the inhabitants willed it and the municipal corporation remained quiescent, as it might.

A different feature would be presented if the city authorities had by act or license sanctioned or encouraged this display of fireworks in the streets. In the case of a public nuisance, that might be regarded as an act of misfeasance. Such appears to be the case cited of *Forget* v. *Corporation of Montreal* (1888), 4 Mon. Sup. Ct. 77. But here all that can be attributed to the defendants is that they did not intervene to stop the procession; which, at the highest, is only non-feasance. And English and Canadian law is well settled that in regard to the governance and control of highways mere

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nonfeasance on the part of the municipal corporation in which the way is vested, forms no ground for seeking redress from the courts.

The argument of the plaintiff was that a cause of action arose because the city had passed a by-law, and that the by-law was systematically disregarded to the knowledge of the officers of the city, and that no steps were ever taken to enforce it by the city.

This is a novel proposition, which has its sole sanction in the decisions of the Maryland courts, but is opposed to all other American, English and Canadian authorities.

Very much in point are the observations of Mr. Justice Gwynne giving the judgment of the Court in *City of Montreal* v. *Mulcair* (1898), 28 S.C.R. 458, at p. 469, which, with other cases, is noted in the last edition of the American and English Encyclopædia of Law, 2nd ed., vol. 20, p. 1206.

The cases and references on the argument are sufficient to manifest this; and I can do nothing but dismiss the action with such costs as would be taxed had the point been dealt with on demurrer under Rule 373.

G. F. H.

[MACLENNAN, J.A.]

MUSKOKA PROVINCIAL ELECTION.

1902
July 4.

Ballots—Marking of—Initialling of.

Ballots marked with a straight line only are improperly marked and cannot be counted, while ballots marked with a cross upon or above the upper division line, or marked with a cross made by three or four pencil strokes, or marked with a cross and also with what might be taken for a "c," are properly marked and should be counted.

In initialling the ballots a deputy returning officer at one sub-division put as his initials H. G. instead of his full initials H. C. G., and a deputy returning officer at another polling sub-division put McN. instead of his full initials W. D. McN. :—

Held, that such ballots were sufficiently initialed within the meaning of the Act, the object of such initialling being merely the identification of the ballot. which was effected here, there being no suggestion that the number of ballots cast at the polling sub-division was not correct; and, *semble*, that under these circumstances the ballots should not be rejected, even if not initialed at all.

APPEALS from the decision of the county judge of the District of Muskoka, on a recount of votes, were heard before MACLENNAN, J.A.

The election was held on May 29th, 1902, in which Samuel Bridgland was the successful candidate and A. A. Mahaffy the defeated candidate.

C. A. Masten, and *Eric N. Armour*, for Mahaffy, the defeated candidate.

R. A. Grant, for the returned candidate.

July 4. MACLENNAN J.A. :—In this case both candidates, Mahaffy and Bridgland, appealed from the decision of the county Judge on a recount of votes.

On Mahaffy's appeal I dismissed all the objections to the Judge's rulings except two. Two ballots, numbered 5081 and 7981, were marked with a straight line only for Bridgland and were allowed for him. I think they should have been rejected.

On Bridgland's appeal two ballots, Nos. 1761 and 6987, were marked with a cross, the one upon and the other above the upper line. These had been rejected. I think they should have been counted for Bridgland. No. 5067, marked with a

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straight line, and allowed for Mahaffy, should be disallowed, and No. 26, disallowed by the Judge, should be allowed for Bridgland, a cross made by three or four strokes of the pencil.

The Judge disallowed all the votes at No. 17, Wood and Medora, on the ground that the deputy returning officer, whose name was Henry Cully Guy, initialed all the ballots at that poll "H. G." instead of "H. C. G." He also disallowed all the votes at poll 18, Wood and Medora, on the ground that the deputy returning officer, William D. McNaughton, endorsed the ballots with the initial "McN.," instead of with the full initials of his name. I am of opinion that, the sole purpose of requiring the deputy returning officer to endorse his name or initials upon the ballot being the identification of the ballot brought back by the voter as that which was delivered out to him, the initials used by both these officers were sufficient. The Legislature has shewn its intention—when everything else is found to be regular—not to require great exactness in the matter of the name or initials, by enacting that where the number of ballots which were used is found to be correct, the total absence of name or initials, or some of them, should not be a ground for rejection: sec. 112 (2). There was no suggestion that the number of ballots found at these polls was not correct, and that being so, I do not think it would have been right to disallow the votes if none of them had been initialed. However that may be, I think they were sufficiently initialed within the meaning of the statute.

A ballot No. 3438 at Wood and Medora 17, which had, besides a cross, a small obscure pencil marking thereon, which might be taken for the letter C, was allowed by the deputy returning officer, and I am unable to say he was wrong in allowing it for Bridgland.

Both parties having been partly successful in the appeal, I think it is not a case for costs.

G. F. H.

[OSLER, J.A.]

RE PRINCE EDWARD PROVINCIAL ELECTION.

1900
June 30.

Parliamentary Elections — Recount of Votes — Ballot Papers — Absence of Candidates' Numbers.

The candidate's number, mentioned in sec. 69 (3) of the Ontario Elections Act, R.S.O. 1897, ch. 9, is not an essential part of the ballot paper; and where a deputy returning officer, in detaching the ballot papers from the counterfoils, did so in such a manner that the candidates' numbers were left on the counterfoil, instead of appearing on and as part of the ballot papers, such ballot papers, when marked by voters, were not rejected.

RECOUNT of ballots on appeal from the decision of the Judge of the county court of Prince Edward, under sec. 129 of the Ontario Election Act, R.S.O. 1897, ch. 9. The facts appear in the judgment.

The appeal was heard by OSLER, J.A., on the 28th June, 1900.

S. W. Burns, and *Eric N. Armour*, for Williams.

C. H. Widdifield, for Currie.

June 30. OSLER, J.A.:—There were two candidates at the election. Their names and numbers were printed on the ballot papers in ink of different colours, as required by sec. 69 (3) of R.S.O. 1897, ch. 9.

At fourteen polling places in the electoral district the deputy returning officer, in detaching the ballot paper from the counterfoil, did so in such a manner that the candidates' numbers were left on and as part of the counterfoil, instead of being on and appearing as part of the ballot paper.

If the ballot papers in that condition ought to have been rejected, the appellant candidate should have been returned as having the majority of legal votes.

If otherwise, the appeal must be dismissed, as no other objection was argued or taken before me.

Section 69 (2) provides that every ballot paper shall contain the names of the candidates, arranged alphabetically in the order of their surnames, or if there be two or more candidates with the same surname, of their other names, and the ballot

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papers may be according to the Form 11 in Schedule A to the Act.

Section 69 (3) provides that the *number* and names of every candidate shall, if practicable, be distinctly printed in ink of different colours, if on the nomination day the candidates agree as to the colours.

By sec. 69 (4) it is provided that every ballot paper shall have a counterfoil attached thereto, and every ballot paper and every counterfoil shall specify the name of the electoral district for which it is to be used, and every ballot paper shall have a number printed on the back thereof, and the same number shall be printed on the face of the counterfoil attached thereto.

It is hardly necessary to say that the number mentioned in sub-sec. (3) is not the number mentioned in sub-sec. (4). The latter is the number which is to be on the face of the counterfoil and the back of the ballot paper for the express purpose of identifying the voter and finding out how he has voted. The former is the number of the candidate on the face of the ballot paper, and is nowhere referred to or mentioned except in sub-sec. (3), and then only in connection with colour printing.

Sub-section (2) appears to be the only section which contains any positive enactment as to what is required to be printed on the face of the ballot paper, aside from its mere form. Nothing more seems necessary than the names of the candidates. For the rest the ballot papers may be in the form given in the schedule. That is directory; and the form, no doubt, shews a number in a compartment to the left of the candidate's name, indicating the order in which it appears on the paper.

I am unable to say that this number must be regarded as an essential part of the ballot paper. On the contrary, I feel no doubt that it is not.

It was argued that the omission of the compartment containing the candidate's number left so much less space in which the voter might make his mark. I think it leaves him less room to go wrong.

And it was said that the voter who was unable to read might yet be able to recognize a number and be able to mark his ballot opposite the candidate's number. Perhaps in this way the number might be an aid to an illiterate voter; but, in

the absence of any positive enactment (apart from colouring), I ought not to hold that the error of the deputy returning officer in tearing off that number works the destruction of the ballot, nor should we strain the Act in favour of the illiterate voter. Section 106 goes far enough in that direction.

I should have thought that sub-sec. (4) of sec. 69 required the name of the electoral district to be printed on the face of the ballot paper. The form, however, shews it printed on the back beneath the number of the ballot paper.

Sub-section (2) is the mandatory clause as to what is to be printed on the face of the ballot paper, and, as that says nothing about the number of the candidate, I conclude that such number is not a material part of it.

I, therefore, dismiss the appeal, making no order as to costs.

E. B. B.

[IN THE COURT OF APPEAL.]

C. A.
1902
June 28.

HOPKIN
v.
HAMILTON ELECTRIC LIGHT AND CATARACT POWER CO.

Company—Electric Light Company—Works—Vibration—Nuisance—Injury to Adjoining Property—Injunction—Damages—Powers of Company—Alienation of Land—Private Act of Incorporation.

[Judgment of Street, J., 2 O.L.R. 240, affirmed.

THIS was an appeal by the defendants from the judgment of Street, J., 2 O.L.R. 240.

The appeal was heard by ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 16th and 17th December, 1901.

G. Lynch-Staunton, K.C., and *W. W. Osborne*, for the appellants.

D'Arcy Tate, for the plaintiff, the respondent.

June 28. MOSS, J.A.:—The learned Judge's conclusions of fact are fully sustained by the testimony. The operations carried on by the defendant company in its works adjoining the plaintiff's dwelling-house and premises produce vibration in the building to such an extent as to be a most serious nuisance, and occasion her and the members of her family the greatest discomfort and annoyance, and materially reduce the annual as well as the selling value of her property.

The defendant company, however, takes the ground that it is entitled to carry on its operations as it is doing, and that, although it may inflict substantial damage upon the plaintiff, she is not entitled to the intervention of the Court in her favour. The learned trial Judge has decided against the defendant's contention, and I am of opinion that his decision should be sustained.

The defendant company is a corporation created as a private commercial enterprise. Speaking generally, its objects are the production, transmission, and distribution of electric light, heat,

and power for purposes of profit to such municipal and other corporations or individuals as may contract with it for the supply to them of light, heat, or power.

The better to enable it to carry on its business and perform its contracts, it has secured the grant of extensive powers. Among these are the right to construct, maintain, complete, and operate works, to acquire by purchase and hold lands for the purposes of the business, to make and enter into agreements authorising the erection of poles and stringing of wires upon and along the streets and highways, to carry wires and conductors through the lands of a proprietor within ten miles from a municipality without his consent, and other powers of a like nature. In addition to these, the provisions of secs. 13 to 20, both inclusive, of the Railway Act of Ontario, in so far as applicable and when not inconsistent with its special Act or the powers conferred by its letters of incorporation, are made applicable to the defendant company and its undertaking. But, notwithstanding the possession of these extensive powers, the defendant company is not to be classed otherwise than as a private corporation. It has a present stock capital of $250,000, which it has power to increase to $1,000,000. It aims at exercising the powers, privileges, and franchises which it has acquired for the benefit of its shareholders. The contracts which it has entered into with the city of Hamilton and other municipalities, though scheduled to and confirmed by the Act 61 Vict. ch. 68 (O.), still continue to operate as contracts enforceable by the parties to them, just as any legal and binding contract between parties capable of contracting would be enforced. They are founded upon, and expressed in the form of, contracts between the respective parties. No general public right is given, or obligation to serve the public generally is created by them. They create no exclusive right or monopoly in favour of the defendant company, but leave the various municipalities free to deal with other corporations or persons for similar privileges. It is not unlikely that—as said by Farwell, J., in *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1900] 2 Ch. 352, at pp. 361, 362—if the Legislature had not only declared the agreements valid but had said that the defendant company must perform them, there would be a statutory

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enactment over and above the agreement validated between the parties, which enactment the Attorney-General could probably enforce, or to which, at any rate, the remedy by mandamus would apply. But there is here no such mandate from the Legislature. And I agree with the learned trial Judge that the defendant company is not by the Acts of the Legislature, or any of them under which it derives its powers, compellable by mandamus to exercise them.

The letters patent incorporating the defendant company direct that the company shall be subject to the provisions of the Act respecting companies for steam and heating or for supplying electricity for light, heat, or power, and that the company in prosecuting the purposes and objects of its incorporation may exercise the powers authorized by the said Act. The Act (R.S.O. 1897, ch. 200) incorporates secs. 27 and 42 of the R.S.O. ch. 199, providing for the substitution of the words necessary to make them (and other sections) apply to a company incorporated for supplying heat, light, or power by means of electricity. Section 27 requires the defendant company to construct and locate its works so as not to endanger the public health or safety, and sec. 42 declares that nothing in the Act—and so nothing in the letters of incorporation—shall authorize the defendant company or any person acting under its authority to take, use, or injure for the purposes of the company any house or other building . . . . without the consent in writing of the owner or owners thereof first had and obtained.

The defendant company is, therefore, subject to these restrictions, unless there is something in the Act 61 Vict. ch. 68 (O.) to relieve it therefrom. I do not find in the Act anything having that effect. I think with the learned trial Judge that in the absence of the general clause of the Railway Act conferring general power to take lands, and of the clauses enabling surveys and plans to be made and filed as a preliminary to expropriation, there is much difficulty in making effectual use of the sections of the Railway Act which have been adopted.

It appears to me that the defendant company is simply in the position that it can operate its works on its own property, just as any of the public may, in such manner as not to injure the property of a neighbour, or so as not to improperly or

unduly interfere with his reasonable enjoyment of his property. This is clearly not a case in which the operation by the defendant company of its works as they are being operated is authorized without reference to the effect upon others. It resembles the case of *Managers of Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193, in that no use of any land which must necessarily be a nuisance at common law is authorized, and it is not shewn to be impossible that land might be acquired in such a situation and of such an extent as to enable the works to be operated without being a nuisance to adjoining land. The distinction between such a case and that of a railway is pointed out by Lords Halsbury and Selborne in *London and Brighton R.W. Co.* v. *Truman* (1885), 11 App. Cas. 45, and by the Lords Justices in *Rapier* v. *London Tramways Co.*, [1893] 2 Ch. 588.

The Legislature has given the defendant company power to construct and operate works, and for these purposes it must have buildings and machinery. But it does not, I think, appear that the Legislature also intended to limit and did limit the defendant company's obligations to others so as to cast upon it no greater duty than the duty to take reasonable care, and, therefore, it must exercise its powers in respect of its works so as not to commit a nuisance.

Reference may be made to the recent decision of the Supreme Court of Canada in *Gareau* v. *Montreal Street R.W. Co.* (1901), 31 S.C.R. 463. As appears from the argument of counsel and the judgment of Mr. Justice Girouard, the street railway company maintained that, having been authorized by the Legislature to operate an electric railway system in Montreal and its suburbs, it was entitled to produce electricity without restriction and without responsibility for damages save in the case of negligence. These claims were denied by the majority of the Court. Mr. Justice Taschereau, who thought the case should be dealt with entirely on the facts, did not deal with the question raised in this case.

With regard to the nature of the relief granted, I am of opinion, for the reasons advanced by the learned trial Judge, that the plaintiff is entitled to the injunction. But the defen-

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dant company should be allowed a reasonable time to enable it to abate the nuisance.

The appeal should be dismissed.

ARMOUR, C.J.O., OSLER and MACLENNAN, JJ.A., concurred.

LISTER, J.A., died while the appeal was *sub judice.*

T. T. R.

[IN THE COURT OF APPEAL.]

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June 28.

TOWNSHIP OF GLOUCESTER v. CANADA ATLANTIC RAILWAY COMPANY.

Way—Road Allowance—Obstruction—Railways—Fences—Municipal Corporations—Railway Committee.

AN appeal by the defendants from the judgment of Lount, J., reported 3 O.L.R. 85, was argued before OSLER, MACLENNAN, MOSS, and GARROW, JJ.A., on the 6th of May, 1902, and on the 28th of June, 1902, was dismissed, the Court agreeing with the reasons for judgment reported below.

Chrysler, K.C., for the appellants.

Geo. F. Henderson, for the respondents.

R. S. C.

[IN CHAMBERS.]

IN RE CENTRE BRUCE PROVINCIAL ELECTION.

STEWART V. CLARK.

1902
July 14.

Parliamentary Elections—Petition—Copy—Service.

In the printed copy of the petition served upon the respondent the concluding prayer had, by mistake of a clerk, a pen stroke down through it:—*Held*, that though the copy was not a "true copy" of the original, yet as the defect was a purely formal one, and could not possibly have misled the respondent, it was not fatal, and leave to amend was given.

A MOTION by the respondent to set aside the service of the petition upon him, on the ground that the copy served was not a true copy, was argued before OSLER, J.A., on the 12th of July, 1902. The facts are stated in the judgment.

Edmund Bristol, and *E. Bayly*, for the respondent.

Aylesworth, K.C., for the petitioner.

July 14. OSLER, J.A.:—A petition, regular in form, was duly presented by the defeated candidate. Notice of the presentation was duly served on the respondent, and together therewith a paper purporting to be a copy of the petition. By some error on the part of a clerk a pen was run through the last clause of the copy—the prayer of the petition—which was served in that condition. The respondent moves to set aside copy and service ; the petitioner, while contending that nothing is wrong, moves to amend.

If the pen stroke through the final clause of the printed copy of the petition is intended to signify its deletion, the paper served is undoubtedly not a true or complete copy of the petition. Nevertheless, the respondent is not left in any uncertainty as to the relief claimed as appropriate to the long string of charges set forth in the petition, and I cannot see that he is prejudiced in the least by the omission he complains of.

Mr. Bristol argued very earnestly that the slip was fatal, and could not be amended, relying upon such cases as *Maude* v. *Lowley* (1874), L.R. 9 C.P. 165 ; *Williams* v. *Mayor of*

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Tenby (1879), 5 C.P.D. 135; *Lisgar Election Case* (1891), 20 S.C.R. 1; *Burrard Election Case* (1901), 31 S.C.R. 459, and other cases in which it has been held that a petition cannot be amended by the addition of a new or further ground for avoiding the election, or the entire omission of some statutory condition or preliminary, cured. These cases, however, are not analogous to the case in hand. There was in them either the attempt to set up at too late a period some special ground for avoiding the election, or the clear, absolute omission to do something which the relative statute required to be done, *e.g.*, to give notice of the presentation of the petition or to leave a copy of it within the prescribed time for the returning officer—an essential part, as Ritchie, C.J., said in the *Lisgar* case, of the presentation or filing of the petition. The objection taken here is, under the circumstances, a purely formal one, to which by Rule LX. no effect ought to be given, and I see nothing in the Act which forbids the exercise of the powers of the Court under sec. [illegible] (1) of the Controverted Elections Act to cure it by amending the copy served (which is before me), just as a defect in the copy of a summons in an action in the High Court may be amended.

The petitioner must pay the costs of the application, which are to be the respondent's in any event of the cause, and over and above any costs which may be awarded to him at the trial.

R. S. C.

[IN THE COURT OF APPEAL.]

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June 28.

CUSHEN v. THE CITY OF HAMILTON.

Payment—Recovery Back—Illegal License Fee.

A municipal corporation passed a by-law providing that (subject to certain exceptions) no butcher should, without being duly licensed, sell any fresh meat in any part of the municipality. The fee was fixed at $10, and the by-law provided that a penalty of not exceeding $50 might be imposed by summary prosecution. The plaintiff, after some demur, took out licenses for two years, but in the third year refused to do so, and upon appeal by him from his summary conviction for a breach of the by-law, the by-law was held to be invalid, and the conviction was quashed :—

Held, in an action brought by him to recover back the fees paid by him, and by other butchers whose rights had been assigned to him, that the fees having been paid with full knowledge of the facts, under a claim of right, without fraud or imposition, and without actual interference with the business of the butchers, or compulsion exercised upon them, could not be recovered back.

Judgment of Rose, J., reversed.

AN appeal by the defendants from the judgment of Rose, J., at the trial, was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 4th and 5th of June, 1901. The facts are stated in the judgment.

MacKelcan, K.C., and *J. L. Counsell*, for the appellants.

Riddell, K.C., and *J. G. Gauld*, for the respondent.

June 28. OSLER, J.A. :—This is an action brought under somewhat unusual circumstances to recover back money paid by the plaintiff and other persons to the defendants.

On the 11th of May, 1896, the defendants passed a by-law, No. 839, by the 14th section of which it was enacted, under the supposed authority of what is now section 581 of the Municipal Act, R.S.O. 1897, ch. 223, that "no butcher or dealer shall without being duly licensed under this by-law, sell or expose for sale any fresh meat in any part of the city of Hamilton; but this shall not apply to the sale, from an ordinary butcher's waggon in the market, of beef in quantities of not less than a quarter of a carcass, or of mutton, lamb, or veal, by the carcass." The license fee was fixed at $10. The license was to be in force for one year from the date of issue, and was to be issued in the prescribed form on the production of a receipt from the city treasurer for the license fee. A penalty of not exceeding

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$50 might be imposed on a summary prosecution for breach of the by-law, recoverable by distress and sale of the goods of the offender; and in default of sufficient distress he might be imprisoned, with or without hard labour, for any period not exceeding twenty-one days.

The plaintiff was a butcher, carrying on his trade in the city of Hamilton, and was lessee of a stall in the market there. He knew of the passage of the by-law and was familiar with its terms. He was called upon by the market inspector, and was required by him to take out a license. He did so, paying the prescribed fee in the years 1896 and 1897, with, as he says, some unwillingness and hesitation. In the year 1898 he refused to pay the fee and was prosecuted before the police magistrate and convicted of a breach of the by-law. He had the conviction removed by *certiorari* into the High Court, by which Court it was afterwards quashed on the ground that the by-law was illegal, the defendants having exceeded their statutory authority in passing it. The by-law itself has not been quashed or set aside. The plaintiff now sues to recover back the sums paid by him for license fees in the years 1896 and 1897, and also the fees paid by eleven other butchers in the city, who paid their fees and took out their licenses for the years 1896, 1897 and 1898, or two of those years; and who have assigned their claims against the city in respect thereof to the plaintiff. In the case of some of these payments there was no evidence of the circumstances under which they were made; and as to others, it appeared that they were so paid to avoid a threatened prosecution for breach of the by-law. Two of the witnesses spoke of a statement made to them by the market inspector or other city official, that they could not be allowed to stand in the market unless a license was taken out; but it is clear that there was neither power nor attempt to enforce such a threat, and the proper inference is that if made at all it was stated only as a result which would follow a prosecution and conviction for a breach of the by-law.

Under these circumstances, I am of opinion that the action does not lie. "The common principle is that if a man chooses to give away his money or take his chance whether he is doing so or not, he cannot afterwards change his mind. But it is

open to him to shew that he supposed the facts to be otherwise, or that he really had no choice:" Pollock on Contracts, 6th ed., p. 579; *Brisbane* v. *Dacres* (1813), 5 Taunt. 143.

It is clear that the facts were all known to the plaintiff and the others of whose claims he has become the assignee. The question then is, whether these payments are to be regarded as voluntary payments or made under compulsion—made, that is, under circumstances which left the parties making them no choice. The latter alternative, as stated in the passage I have just quoted, is of course expressed in condensed language, comprising such cases as payments of extortionate demands by public officers; payments of illegal demands *colore officii*; payments made to obtain possession of property improperly detained, or to induce a person or company, *e.g.*, a public carrier, to do what the latter was bound to do without it: *Parker* v. *Great Western R.W. Co.* (1844), 7 M. & G. 253; or to permit the person making it to do what he was entitled to do without payment: *Steele* v. *Williams* (1853), 8 Exch. 625; or to prevent a wrongful seizure of property which it is in the power of the party demanding payment to make without adopting the ordinary legal remedies: *Hooper* v. *Mayor of Exeter* (1887), 56 L.J.Q.B. 457; *Kennedy* v. *MacDonell* (1901), 1 O.L.R. 250. Under one or other of these classes fall the cases relied upon in the judgment below.

In *Morgan* v. *Palmer* (1824), 2 B. & C. 729, the plaintiff was a publican who was bound, by 5 & 6 Edw. VI. ch. 25, to take out a license to keep a public house, and being entitled to the license the mayor of the borough nevertheless demanded and received from him, as a condition of granting it, a fee to which he was not by law entitled. In *Dew* v. *Parsons* (1819), 2 B. & Ald. 562, the defendant—a sheriff—had demanded and received from the plaintiff fees in excess of those to which he was by law entitled. And *Steele* v. *Williams*, 8 Exch. 625, was an action against a parish clerk to recover fees which he had illegally exacted as a condition of permitting the plaintiff to search the parish register. The case at bar bears no analogy to any case of the classes I have mentioned. The license fees were demanded under a claim of right, without fraud or imposition, and they were paid by the plaintiff and others who

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knew the facts and chose to yield to the demand rather than contest it. In Dillon on Municipal Corporations, 4th ed., sec. 944, p. 1150, it is said: "Money voluntarily paid to a corporation under a claim of right, without fraud or imposition, for an illegal tax, license, or fine, cannot without statutory aid be recovered back from the corporation, either at law or in equity, even though such tax, license, fee, or fine, could not have been legally demanded or enforced," citing *Mayor of Richmond* v. *Judah* (1834), 5 Leigh (Virginia) 305. In *Town Council of Cahaba* v. *Burnett* (1859), 34 Ala. 400, it was held that a payment of money to the clerk of the council as the price of a license for retailing spirituous liquors could not be considered to have been made under compulsion though the ordinance imposed a fine and imprisonment as the penalty for its breach; and therefore the money could not be recovered back by action. "No one" (says the Court) "can be heard to say that he had the right and the law with him, but he feared his adversary would carry him into court, and that he would be unlawfully fined and imprisoned; and that being thereby deprived of his free will, he yielded to the wrong, and the courts must assist him to a reclamation."

In *Mays* v. *City of Cincinnati* (1853), 1 Ohio St. 268, it was held that an action would not lie to recover money paid to procure a license in obedience to the requirement of an invalid ordinance, the payment having been voluntary, notwithstanding that the ordinance prescribed a fine as the penalty of its breach. *Robinson* v. *City of Charleston* (1846), 2 Rich. (S.C. Com. Law) 317, is a similar case. The Court says: "The plaintiff was acquainted with the facts connected with the demand and payment. He had every opportunity of informing himself as to the law, and was under no coercion to abide by the ordinance under which he paid his money. He either paid it with a knowledge of the law on the subject, or in ignorance of it. In either point of view, the payment was voluntary." And see also *Benson* v. *Monroe* (1851), 7 Cush. 125; *Oceanic Steam Navigation Co.* v. *Tappan* (1879), 16 Blatch. 296; *Clarke* v. *Dutcher* (1824), 9 Cow. 674; *Boston Glass Co.* v. *City of Boston* (1842), 4 Metc. 181; *Mariposa Co.* v. *Bowman* (1867), Deady's Cir. Rep. 228; *Radich* v. *Hutchins* (1877), 95 U.S. 210, *per*

Field, J.: "To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment, over the person or property of another, from which the latter has no other means of immediate relief than by making the payment. As stated by the Court of Appeals of Maryland [*Mayor of Baltimore* v. *Lefferman* (1846), 4 Gill (Md.) 425] the doctrine established by the authorities is, that 'a payment is not to be regarded as compulsory, unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid.'"

The right of the municipality to receive the license fee and the obligation of the plaintiff and others to take out the license depended upon the validity of the by-law, and were enforceable by means only of a legal proceeding. There was no power to enforce the by-law by distress or other interference with the plaintiff's business. The only consequence of his refusal to take out a license and pay the fee, was that a summary prosecution before a magistrate might have been instituted in which the validity of the by-law might have been tested. The fact that the payments were made in compliance with the supposed obligation of the by-law seems to me to make no difference, because it was open to the plaintiff to have questioned its validity on the occasion of the first demand, as he successfully did on the last. Nor can it alter the case that the proceedings against him were of a *quasi* criminal instead of a civil nature. The point is that the defendants had no power to enforce the by-law except by resorting to judicial proceedings of some kind, in which it was open to the plaintiff to resist his liability as effectually as if he were being sued for a debt. His right to succeed in this action does not depend upon his having successfully resisted the defendants' last demand, for if he has the right to sue at all he might have done so on the very day he made any of the payments he now seeks to recover. There was, therefore, no reason why he should not have put the validity of the by-law to a test in the first instance. For these reasons I am of opinion that the appeal

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should be allowed, and the action dismissed with costs throughout.

MACLENNAN, J.A.:—I am unable to agree with the judgment appealed from.

The facts are simple. The defendants, believing they had the power so to do, passed a by-law prohibiting butchers and dealers from selling meat within the city without procuring and paying a fee for a license. The prohibition, however, was not to apply to the sale from a butcher's waggon in the market of beef in a quantity not less than a quarter of a carcass, or of mutton, lamb or veal by the carcass. The plaintiff paid the license fee for two years, on demand of the license inspector, after putting him off several times, and after being threatened with prosecution. In the third year he refused to pay, was summoned and convicted; but on appeal the conviction was quashed on the ground that the by-law was illegal.

The present action is brought to recover back the license fees which he had paid, and my late brother Rose held that the plaintiff was entitled to recover, the payment not having been a voluntary payment. He found as a fact that the plaintiff was prevented by the defendants from doing that which he had a right to do unless and until he paid an illegal demand.

I do not find that the evidence goes so far as to prove that the plaintiff abstained from or was interfered with at all in carrying on his business by the demands or threats of the inspector. The defendants acted honestly but mistakenly, and the inspector also acted in good faith. The plaintiff knew all the facts, and that the fee was demanded only by reason of the by-law. He knew that if the by-law was valid he was bound to pay, and if not that he could refuse. If he had been sued or summoned for non-payment, and before trial or hearing of the summons had paid the fee, I think the payment would be clearly voluntary, and not recoverable, there being no question of the good faith of the defendants or of the inspector. In *Cadaval* v. *Collins* (1836), 4 A. & E. 858, money paid by a defendant after an action commenced upon a fictitious claim, was held to be recoverable, the jury having found that Collins knew, when he received the money, that he had no claim on

the plaintiff. In that case Patteson, J., said: "Where there is *bona fides*, and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back." See also Broom's Legal Maxims, 7th ed., p. 207.

I think the appeal should be allowed, and the action dismissed.

MOSS, J.A., concurred.

ARMOUR, C.J.O., being absent on leave, took no part in the judgment.

LISTER, J.A., died before the delivery of judgment.

Appeal allowed.

R. S. C.

[DIVISIONAL COURT.]

D. C.
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May 19.

RE BOARD OF PUBLIC SCHOOL TRUSTEES FOR SCHOOL SECTION 5 OF THE TOWNSHIP OF CARTWRIGHT AND THE CORPORATION OF THE TOWNSHIP OF CARTWRIGHT.

Public Schools—Selection of School Site—Award—Conditions Precedent—Mandamus—59 Vict. ch. 70, sec. 31 (O.).

The words "selection of a site for a new school house," contained in sec. 31 of the Public Schools Act, 59 Vict. ch. 70 (O.) refer to a selection of a site in a newly established school section, and probably also to the selection of a site for an additional school house, while the words the "change of site for an existing school house" also contained in such section, refer to the case where a site has been chosen and a school house provided, but which it is deemed desirable to abandon, and to choose a new site.

The section does not apply to the case of a new school house to be built upon an existing site; but in any event before arbitration proceedings can be taken and an award made under the said section, the trustees must first come to a decision which the ratepayers decline to approve of on the matter being submitted to them.

An award made without such prerequisites having been complied with is unauthorized and nugatory.

The fact that such an award is valid on its face is no answer to an application for a mandamus to compel a township municipality to pass a by-law to raise the amount required for the purchase of a site and erection of a school house where it appears to have been made without jurisdiction.

Judgment of Falconbridge, C.J.K.B., reversed.

THIS was an appeal to the Divisional Court from an order made by Falconbridge, C.J.K.B., sitting in Chambers, dismissing with costs a motion for an order for a mandamus.

On February 17th, 1902, the appeal was heard before a Divisional Court composed of MEREDITH, C.J.C.P., MACMAHON and LOUNT, JJ.

Riddell, K.C., for the appellants.

H. T. Hunter, for the respondents.

May 19. MEREDITH, C.J.:—Appeal by the public school board from an order made by the Chief Justice of the King's Bench on the 21st October, 1901, dismissing with costs their motion for an order for a mandamus to the respondents requiring them to pass a by-law for the issue of debentures for $1,000 for the purpose of the purchase of a school site and the erection of a school house thereon, and to issue the debentures as they should be required by the appellants. The intention of the

appellants was to apply the proceeds of the debentures in the purchase of a new school site and the erection on it of the school house.

All the steps necessary to be taken to entitle the appellants to require the by-law to be passed and the debentures to be issued were regularly and properly taken, unless, as the respondents contend, the proceedings to change the school site were adopted in contravention of the provisions of sub-sec. 3 of sec. 31 of the Public Schools Act, 59 Vict. ch. 70, because of an award made on the 24th February, 1899, determining that no change should be made in the site, which if a valid award, according to the provisions of the sub-section, was to be binding for at least five years after the date of it.

The appellants dispute the validity of this award, and contend that it was a void proceeding, because, as they contend, according to the provisions of sub-sec. 2 of sec. 31, it is only after the trustees have decided upon a change of site, and thereafter at the meeting of the ratepayers of the section called pursuant to sub-section 1, a difference is found to exist between a majority of the ratepayers present at the meeting and the trustees as to the suitability of the site selected by the latter that an arbitration is to take place, and because, as they also contend the fact is, the trustees had not before the special meeting of the ratepayers, which was called by them in the year 1899, made any selection of a site.

The facts appear to be as follows: On the 28th December, 1898, at a regular meeting of the trustees it was resolved to call a meeting of the ratepayers for Saturday, the 7th January, 1899, to consider the advisability of building a new school house; at the meeting of the 7th January, 1899, a resolution was come to to build a new school house, a motion to continue to use the old one not having been entertained; another special meeting was held on the 21st January, 1899, at which practically nothing was done; another special meeting was held on the 28th January, 1899, which was called to consider and decide the question of school site, at which it was resolved by a vote of twenty-nine against twenty-six, that the new school site should be on the corner of lot 16 in the 5th concession or as near as convenient, whereupon the ratepayers appointed

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J. L. Power as arbitrator, and the trustees decided that Robert Thompson should be appointed their arbitrator. Another meeting of the ratepayers was held on the 18th February, 1899, for the purpose, as the minutes state, of appointing "an arbitrator on the selecting of a school site," and at that meeting Wesley Mountjoy was appointed arbitrator for the ratepayers; yet another special meeting of the ratepayers was held on the 18th March, 1899, at which a motion that a new school house should not be built that year was proposed, which the chairman refused to put to the meeting because a motion to build a new school house had been voted upon and carried at a previous meeting, whereupon the proposer of the motion appealed against the ruling of the chairman, and himself put his motion to the meeting, when it was carried.

In the meantime the arbitration had taken place, the arbitrators being W. E. Tilley, the public school inspector of the county of Durham, and Wesley Mountjoy and Robert Thompson, who had previously been named as arbitrators by the ratepayers and the trustees respectively, as already mentioned.

The arbitrators awarded and adjudged that "the present site be retained," and suggested that the trustees should enlarge the side to the north before building the new school house.

It clearly appears from this statement of the facts, which is taken from the minutes kept by the secretary of the trustees, that the majority of the ratepayers voted in favour of a change of the school site to the corner of lot 16 in the 5th concession or as near as convenient, and that the question was submitted to and dealt with by the ratepayers without any selection of site having been first made by the trustees; indeed, I gather from the minutes and the nature of the proceedings that the trustees or a majority of them were opposed to any change of site, and of course had not therefore in fact selected one.

The trustees and the arbitrators seem to have proceeded on the supposition that the effect of what had been done was that the trustees had selected the existing site for the erection of a new school house, and that the majority of the ratepayers being in favour of a change of site, the case came within the

provisions of sec. 31, and was one for arbitration under its second sub-section.

There is no minute of any meeting of the trustees at which it was decided to select the existing site for the new school house, or at which any decision was come to with reference to the question of site, and the affidavits filed on behalf of the respondents are wholly insufficient to establish that anything of that kind was done by the trustees which amounted to a valid and binding act of the board (section 19); but, even if it had been shewn that a valid resolution in favour of retaining the existing school site and erecting a new school house upon it had been passed by the trustees, there still would have been no warrant for the arbitration.

The Act which was in force when the proceedings in question took place was 59 Vict. ch. 70 (O.), and the section relating to them is sec. 31. The Act has since been amended and consolidated (1 Edw. VII., ch. 39 (O.)), and in it sec. 31 is re-enacted and forms sec. 34.

Section 31 is as follows:—"(1) The trustees of every rural school section shall have power to select a site for a new school house or to agree upon a change of site for an existing school house, and shall forthwith call a special meeting of the ratepayers of the section to consider the site selected by them; and no site shall be adopted, or change of school site made, except in the manner hereinafter provided, without the consent of the majority of such special meeting.

"(2) In case a majority of the ratepayers present at such special meeting differ as to the suitability of the site selected by the trustees, each party shall then and there choose an arbitrator, and the county inspector, or, in case of his inability to act, any person appointed by him to act on his behalf, shall be a third arbitrator; and such three arbitrators, or a majority of them present at any lawful meeting, shall have authority to make and publish an award upon the matter submitted to them.

"(3) With the consent, or at the request of the parties to the reference, the arbitrators, or a majority of them, shall have authority, within one month from the date of their award, to reconsider such award, and within two months thereafter to

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make and publish a second award, which award (or the previous one, if not reconsidered by the arbitrators) shall be binding upon all parties concerned for at least five years from the date thereof."

The language of the section is certainly not well chosen, notwithstanding that since the original provisions on the subject contained in the Act of 1850 (13 & 14 Vict. ch. 48) were enacted, at least eight times has the language undergone changes of a more or less extensive character, not always in the direction of more clearly expressing the will of the Legislature.

After the best consideration I have been able to give to the matter, and reading the section in the light of the history and course of the legislation on the subject with which it deals, it appears to me that "the selection of a site for a new school house" means the selection of a site for a school house in a newly established school section, and probably also the selection of the site for an additional school house, if that is thought to be necessary to be provided. The mode of doing this which is prescribed is, first the selection of the school site by the trustees, then the calling of a special meeting of the ratepayers of the section to consider the site selected, when, if the majority of the ratepayers present at the meeting approve of the selection made, the site is adopted; but if the majority of the ratepayers differ from the trustees as to the suitability of the site selected, an arbitration takes place, and the arbitrators are authorized to make and publish an award upon the matter submitted to them.

And that the other case provided for "the change of site for an existing school house" where a site has once been chosen and a school house has been provided, but it is thought by the trustees to be desirable that that site should be abandoned and a new site chosen on which the school house of the section is to stand, and in that case the trustees are empowered to agree upon a change of site, but it cannot, however, be made without the consent of a majority of the ratepayers present at a special meeting called for the purpose of considering the site selected by the trustees, unless where the majority of the ratepayers present at the meeting differ from the trustees as to the suitability of the site selected by the trustees, the result of the arbitration provided for is an award in favour of the decision come to by the trustees.

If this be so, a determination of the trustees not to change the site but to erect a new school house on the existing site is not within the section.

It was at one time expressly provided that if the ratepayers did not assent to a change of site proposed by the trustees, the change could not be made, but the more recent legislation modified this provision so that the change may be made though the majority of the ratepayers are opposed to it, if the result of the arbitration is a determination in favour of the view of the trustees.

In every one of the forms in which the subject of the selection of a site for a new school house or the change of site is dealt with, provision is made for a decision being first come to by the trustees, and I find nowhere in any legislation on the subject, including the section under consideration, any ground for the view that the ratepayers may initiate proceedings for either purpose. Their intervention is to take place after, and only after, the trustees have come to a decision; and, subject to the provision as to the effect of the award of the arbitrators, it is to control the action which the trustees have determined upon, and to prevent effect being given to the decision of the trustees if it is opposed to their (*i.e.*, the ratepayers) view as to what ought to be done.

This distinction is not one of mere form but of substance, and the provision as to the meeting of the ratepayers is in effect the application of the principle of the referendum, with a provision for arbitration if the vote of the ratepayers is in the negative on the proposition submitted to their vote.

I am of opinion, for the reasons I have given, that the position taken by the appellants that the arbitration and award set up by the respondents were unauthorized and nugatory is well taken.

The learned Chief Justice was of opinion that the award being on the face of it a valid award, it was not proper to determine the questions raised as to it on the motion of the appellants for a mandamus.

I am, with respect, unable to agree with that view. I do not see in what way the validity of the award is to be determined unless it be on the application for the mandamus. The

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award having been made, as I think, without jurisdiction, it was not necessary that it should be set aside; it was mere waste paper, and the only objection taken, or that could be taken, to the application made by the appellants to the respondents to pass the by-law, therefore falls to the ground.

I would allow the appeal, discharge the order of the learned Chief Justice, and substitute for it an order for the issue of the mandamus as asked, with costs.

MacMahon and Lount, JJ., concurred.

G. F. H.

[IN CHAMBERS.]

1902
July 4.

Re Board of Public School Trustees for School Section 5 of the Township of Cartwright and the Corporation of the Township of Cartwright.

Appeal—Court of Appeal—Leave to Appeal—Public Schools Act.

Where an order for a mandamus to a township council to pass a by-law for the issue of debentures for the purchase of a school site was refused by a Judge in Chambers and an appeal by the school board was allowed by a Divisional Court, and it appearing that an important question was raised as to the true meaning of a somewhat obscurely phrased section of the Public Schools Act, leave was granted to appeal to the Court of Appeal.

Motion before Moss, J.A., in Chambers for leave to appeal to the Court of Appeal from the judgment of the Divisional Court reported *ante* p. 272, allowing an appeal from the judgment of Falconbridge, C.J.K.B., and directing a mandamus to issue.

Aylesworth, K.C., for the motion.
Riddell, K.C., contra.

July 4. Moss, J.A.:—The motion for a mandamus was brought on to be heard by a Judge in Chambers instead of in Court. There is no reason why this should not have been done, but that circumstance and the fact that the applicants for

leave to appeal to this Court succeeded in the first instance and were the respondents in the Divisional Court, and would have been entitled to appeal, as of course, if the motion had been heard primarily by a Judge sitting in Court, have been considered material factors—when coupled with reasons of a substantial kind for questioning the judgment complained of—in affecting the discretion to be exercised: *Re Sherlock* (1897), 18 P.R. 6-10.

Here a mandamus has been awarded requiring the applicants to issue debentures for a sum exceeding $1000 in principal and interest, and an important question is raised as to the true meaning of a somewhat obscurely phrased section of the Public Schools Act. Plausible grounds of objection to the construction placed by the Divisional Court upon the legislative provisions in question are presented. Questions relating to the validity or invalidity or binding effect or otherwise of an award purporting to be made in pursuance of these provisions are also involved and the matter is of some public interest.

Upon a perusal of all the material submitted and a consideration of the cases cited and some others, I think leave to appeal ought to be given upon the usual terms.

Costs in the appeal.

G. F. H.

[COURT OF APPEAL.]

C. A.
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Jan. 20.

McGARR v. THE CORPORATION OF THE TOWN OF PRESCOTT.

Municipal Corporations—Accident—Defective Sidewalk—Negligence—Notice of Defect.

Where a sidewalk on one of the principal streets of a town on which there was considerable traffic and which had been laid down for so long a period as to become unsound, the scantling or stringers being so rotten as to be unable to hold the nails fastening the boards placed across them, its condition is such as to impose on the corporation a constant care and supervision over it; so that where one of the boards was missing for a week leaving a hole some six or eight inches deep into which a person fell, and was injured, notice to the corporation of such defect in the sidewalk was assumed, and liability for the damage occasioned by the accident imposed on them, MACLENNAN, J.A., dissenting.

The damages assessed at the trial, $1500, were reduced to $900, the Court being of opinion that the latter was the more reasonable amount for the damages sustained, a sprained ankle and an affection of the sciatic nerve, from which recovery might be expected at no distant date.

THIS was an action brought by the plaintiff, a married woman, to recover damages by reason of the alleged negligence of the defendants.

The action was tried before FERGUSON, J., without a jury, at Brockville, on the 25th November, 1901.

J. A. Hutcheson, and *A. A. Fisher*, for the plaintiff.

J. B. Clarke, K.C., and *J. K. Dowsley*, for the defendants.

The learned Judge reserved his decision and subsequently delivered the following judgment, in which the facts, so far as material, are set out.

January 20. FERGUSON, J.:—The action is brought against the municipal corporation of the town of Prescott to recover damages for injuries sustained by the plaintiff, occasioned, as alleged, by the negligence and breach of duty of the defendants in not keeping in a proper state of repair a certain street in the town of Prescott called Ann street.

That the plaintiff sustained severe injuries is not disputed, and it is conceded that she was not guilty of any contributory negligence. It is also admitted that the plaintiff gave the defendants the notice respecting the injury and intended action required by the statute.

On the 7th day of July, 1901, the plaintiff was walking upon and along a wooden sidewalk constructed by the defendants for the use of foot passengers along Ann street in the said town. The sidewalk was about four feet wide, the planks composing it running crosswise of the walk. One of these planks, about ten inches in width, was missing, leaving a hole across the walk of between six and eight inches in depth. The plaintiff and her daughter were walking somewhat hurriedly (the haste being for a reason which the plaintiff in her evidence states) when the plaintiff stepped into this hole and fell over to her right. Her foot—the right foot—and ankle were severely sprained, and there were also injuries to her right leg and side, the marks of which also appeared upon the right hip, occasioned, one would think, by her falling into this hole, and against the cross plank at the side of the hole. The sprain of the foot and ankle was, as I have said, very severe.

There is also, beyond doubt, a very serious injury to the sciatic nerve on the right side, some of the professional witnesses being of the opinion that the plaintiff may never recover from it, others being of the opinion that she may probably in time recover, the opinions as to the length of time before recovery being various—all apparently agreeing that this injury is a very serious one.

A question arose and was much discussed as to whether or not this injury was occasioned by the fall at the hole in the sidewalk or by some other cause.

The professional witnesses, medical gentlemen, were not all of the same opinion as to this. After, however, having paid, as I think, very great attention to this evidence and endeavouring, by calling for explanations by the witnesses, to understand it fully, I am clearly of the opinion that it is shewn that this injury to the sciatic nerve was occasioned by the fall of the plaintiff at this place in the sidewalk, and my finding is accordingly.

It is plain to me that the plaintiff sustained very great and severe injuries, from some of which she may never recover, and I am of the opinion that the amount of damages claimed on the record, $1,500, is not too large a sum if the defendants are

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held liable to the plaintiff for damages. I assess the damages to the plaintiff at this sum, $1,500, if the defendants are liable.

I find also upon the evidence that the medical treatment of the plaintiff for the injuries she sustained was proper treatment, although this is denied on the record by the defendants.

Another and possibly a very difficult question is as to whether or not the defendants have or should be taken to have had sufficient notice of the want of repair of the sidewalk at the place in question. The population of the town of Prescott as stated by the mayor, Mr. Mundle, in his evidence, is 3000 or thereabouts. Ann street is not in the central part of the town, but is the second last street towards one side of the town. It is not very thickly built upon. The evidence as to amount or comparative amount of traffic or travel upon the street was somewhat vague and not all alike, but from the evidence I judge that it cannot be said to be very great or very small when the locality of the street is considered.

The accident, as already said, happened on the 7th of July, which was Sunday. Mr. Mundle, the mayor of the town, says in his evidence that on that day he passed the place about half past four in the afternoon and saw that a plank was out of the sidewalk. He says he looked for the missing plank but could not find it. He says he did not do anything by way of repair. He says the next day he spoke about it to Shaw, the chairman of the committee on streets and walks. The accident occurred at about half past eight p.m., and about four hours after the mayor had seen that the plank was missing.

Elizabeth Larcoe says she saw that the plank was out of the sidewalk as early as the 29th of June, and according to her evidence it was still out on the 3rd of July, but she could speak only of these two days.

John Walsh says the plank was out five or six days before the accident.

John Hobb says the plank was out Thursday, Friday and Saturday before the accident.

George Pane says the plank was out of the sidewalk three or four days just before the accident.

John Walsh says the plank was out five or six days before the accident. Wesley Strong says he saw the plank out the 2nd of July.

From the evidence I think it appears that the sidewalk at this place was in a dangerous condition from the 29th day of June before the accident. The precise age of this sidewalk does not appear. One witness says that it was an old sidewalk ten years ago. It is shewn that the scantlings upon which the boards of the walk were laid were, in most places, very rotten, so much so that they would not hold nails fastening planks to them, and this fact must be taken to have been known to the defendants for a considerable time at least.

I have perused the latest cases on the subject and I am of the opinion that this want of repair existed for such a length of time that having regard to all the other circumstances of the case, amongst which are the population of the town, the fact that the sidewalk was a very old and worn out one, the situation of the street on which the sidewalk was, the work upon it, etc., the defendants ought to have known of it, and that they should be taken to have notice of it. I think it has been made to appear that the plaintiff sustained the injury aforesaid by reason of the negligence of the defendants, and that they are liable to her for damages, which I have assessed at the sum of $1,500.

There will be judgment for the plaintiff for $1,500 with costs.

From this judgment the defendants appealed to the Court of Appeal.

On April 21st, 1902, the appeal was argued before Osler, Maclennan, Moss, and Garrow, JJ.A.

J. B. Clarke, for the appellants. There was no evidence of negligence on the part of the defendants. The sidewalk was duly inspected a short time prior to the happening of the accident, and was found to be in good condition. The evidence of its being rotten was given by a discharged employee who had been accused of stealing. He was unable, however, to point out any specific defect, his evidence being of a general character, and it was quite apparent that he was actuated by spite against the defendants. There was, however, no notice of the defect brought home to the defendants. The fact that the

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Mayor on the day of the accident, and especially as it was Sunday, saw that the plank was missing is not sufficient: *Ince* v. *Corporation of the City of Toronto* (1900), 27 A.R. 410; *Rice* v. *Town of Whitby* (1898), 25 A.R. 191. Then as to the damages. The plaintiff's claim was based on an injury to the ankle and to the sciatic nerve. The evidence shews that at the date of the trial the plaintiff had wholly recovered from the injury to the ankle, while the alleged injury to the sciatic nerve was not occasioned by the accident at all, and was not of the serious character contended for by the plaintiff. Under the circumstances the damages were clearly excessive.

J. A. Hutchinson, for the respondents. There was clearly evidence of negligence. The sidewalk was so old and rotten that the stringers would not hold the nails which fastened the planks placed across them. There was no proper supervision over the sidewalks of the town. Had there been the defect would have been seen as it is quite clear that the board had been missing for a week. As to the evidence of the discharged employee not being worthy of belief, no attempt was made by the corporation to discredit his evidence. The fact that the Mayor saw that the board was missing is evidence of notice to the corporation. The condition of the sidewalk and the length of time the board was missing are sufficient evidence of notice. Then as to the damage sustained by the plaintiff. The evidence shews that the accident was of a most serious character. The plaintiff is still troubled from the injury to the ankle, and as regards the sciatic nerve, the doctor appointed at the trial at the instance of the defendants, shews conclusively that it is attributable to the accident, and he doubted if she would ever permanently recover from it. The damages, therefore, are by no means excessive.

June 30. OSLER, J.A.:—I think the learned trial Judge properly held that the sidewalk on the defendants' street was negligently allowed to become and remain out of repair, and that this negligence was the cause of the plaintiff's accident.

The sidewalk was old and its constitution had become extremely enfeebled, the stringers not being sound enough to retain the planks securely. It was in a condition which called

for constant care and inspection, the more so as the street was one of the main streets of the town, or one on which there was a good deal of traffic. Then the plank, the absence of which caused the hole in the walk into which the plaintiff fell, had been out of its place for a week before this happened, and I agree with the learned Judge that under all the circumstances the defendants should have known of the condition of the walk earlier and should have repaired it.

The action, therefore, well lies, and so far I agree with the learned Judge. He has, however, assessed the damages at $1,500, the full amount demanded by the statement of claim. I cannot avoid thinking that this is too liberal an allowance considering the nature of the injuries the plaintiff has sustained —a sprained ankle and an affection of the sciatic nerve—no doubt a severe and painful one, arising some time after the accident, and attributed whether rightly or wrongly to it, but from the effect of which the plaintiff may expect to recover at no very distant time.

Taking everything into consideration it appears to me that an award of $900 damages would more nearly meet the position of the case, and I favour their reduction of that amount varying the judgment accordingly and dismissing the appeal with costs.

MOSS and GARROW, JJ.A., concurred.

MACLENNAN, J.A., dissented, being of opinion that there was no sufficient evidence of negligence, or of notice to the corporation.

G. F. H.

[MACLENNAN, J.A.]

1902

July 2.
July 10.

RE NORTH GREY PROVINCIAL ELECTION.

Parliamentary Elections—Recount of Votes—Jurisdiction of Junior Judge of County Court—Ballots—Irregular Marking—Notice of Appeal—Signature—Result of Appeal—Majority—Reopening Appeal.

A junior Judge of a county court has jurisdiction under the Ontario Election Act, R.S.O. 1897, ch. 9, secs. 124-131, to recount votes.

Four ballots counted for one of the candidates by a deputy returning officer were held to have been properly rejected by the county court Judge on a recount, in consequence of each being marked with a cross in the divisions of both candidates. There was nothing to shew that, as was alleged, one of the crosses had been placed on each ballot, after the count by the deputy returning officer.

A ballot having a distinct cross in the division of one candidate, and an obliterated cross in that of the other, was allowed for the first.

But where there was a distinct cross in one division, and a very faint one in the other, the ballot was rejected.

A ballot marked for one candidate and having the name of that candidate written on the back, was rejected.

Ballots having, instead of a cross, a perpendicular line, a horizontal line, a straight slanting line, were rejected.

A ballot properly marked, but having on the back words written by the deputy returning officer, was allowed.

Ballots marked by placing the cross on the back were rejected.

Several tremulous connected marks in one division. Ballot allowed.

A strongly marked cross in one division, and a thin faint upright pencil mark on the upper edge of the ballot in the other division, not indicative of any intention to make a cross. Ballot allowed.

A distinct cross, and in the same division, in one case a slight, irregular pencil marking, and in another case a series of slight, cloudy, formless pencil markings. Ballots allowed.

A mark consisting of two lines lying very close to each other, partly coincident and then divergent, both distinctly visible in one division. Ballot allowed, as there was evidence of an intention to make a cross.

Remarks of Ritchie, C.J., in the *Bothwell Case* (1884), 8 S.C.R. 676, 696, referred to.

The notice of appeal from the decision of a county court Judge upon a recount of votes under sec. 129 (1) of the Election Act, need not be signed by the appellant candidate personally, but may be signed by his solicitor or agent on his behalf.

Where both candidates appeal from the decision of the county court Judge, and the result of the appeal of one, first heard and determined, is to give his opponent a majority, the appeal of the other will be heard and determined, although it cannot change the result except by increasing the majority.

Neither appeal having been limited to particular ballots, it was open to the candidate whose appeal was first determined to object, when his opponent's appeal was being heard, to certain ballots not previously objected to.

APPEAL from a recount of ballots by the junior Judge of the county court of Grey. The candidates were G. M. Boyd and A. G. McKay, and the Judge upon the recount found a majority of five votes for McKay.

Both candidates appealed, and the appeal of Boyd was first proceeded with, the appeal of McKay being deferred until after the disposition of the appeal of Boyd.

The appeal of Boyd was heard by MACLENNAN, J.A., on the 23rd June, 1902.

S. H. Blake, K.C., and *W. D. McPherson*, for Boyd.

G. H. Watson, K.C., *W. H. Wright*, and *Grayson Smith*, for McKay.

July 2. MACLENNAN, J.A.:—A preliminary objection was taken on behalf of Boyd, which had also been taken before the county Judge, and had been overruled by him, namely, that a junior Judge has no jurisdiction under the Election Act to recount votes. The sections of the Election Act (R.S.O. 1897, ch. 9) bearing upon the question are secs. 124 to 131, inclusive. Section 124 authorizes application for a recount to be made to the "county Judge" of any county in which the electoral district or any part thereof is situated; and in the subsequent sections and sub-sections the Judge is called the "county Judge" or the "Judge."

By the Local Courts' Act, R.S.O. 1897, ch. 54, sec. 2, the designation "Judges of the several county courts" is applied both to the senior and junior Judges of counties. By sec. 4 the style of the senior Judge is declared to be "The Judge of the county court of" (as the case may be) and the style of the other "The junior Judge" thereof. In subsequent sections both Judges are referred to indifferently as county court Judges, as in secs. 7, 12, 13, 17. If the Legislature had intended to confine the jurisdiction in a recount to the senior Judge, it would have designated him by his proper title and style, and not by words which are equally descriptive both of the senior and junior Judge. But if that were doubtful, all question is set at rest by sec. 14 of the Local Courts' Act, which expressly confers on the junior Judge all the jurisdiction which the senior Judge could exercise either by virtue of any statute or otherwise howsoever. It is true this is to be done subject to the general regulation and supervision of the senior Judge; but the certificate in this case shews that the learned

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junior Judge acted with the concurrence and approval of the senior Judge. I am, therefore, of opinion that the jurisdiction of the junior Judge is free from doubt.

Four ballots counted for Boyd at No. 9 St. Vincent were disallowed by the Judge in consequence of being marked with a cross not only in Boyd's division but also in that of McKay. These were numbers 6418, 6421, 6427, and 6429; and the Judge's decision is complained of. In his certificate he says: "I was of opinion, under all the circumstances, that the markings on these four ballots in McKay's compartment had been made after the count by the deputy returning officer, but I did not think I had jurisdiction to deal with them on any other basis than as they appeared before me according to the marks on them." And so he disallowed them to Boyd, for whom they had been counted. He adds that his mode of proceeding upon the recount was, that after opening the packet he separated the ballots for Boyd from those for McKay, and then handed the Boyd ballots to McKay's agents for examination, to see whether they had any objection to them, and in like manner he handed to Boyd's agents the McKay ballots for the same purpose. He handed the four in question to McKay's agents as Boyd's ballots, without observing the double cross, and Mr. Watson, after examination, only discovered two of them. It was only after they were handed to Boyd's agent for further examination that the other two were discovered. This makes it plain that at the close of the poll they might well have been counted for Boyd without any one noticing the additional crosses for McKay. The Boyd crosses were on the right hand side of his name, and were distinct and conspicuous. They struck the eye at once. The McKay cross upon three of them is quite obscure and indistinct, and while that on the fourth is more distinct, it is yet much less conspicuous than the Boyd cross. I am unable, with great respect, to agree with the learned Judge that there is any evidence that the McKay crosses were made after the count at the close of the poll. I think they were simply not observed in the hurry of counting; while the crosses for Boyd, being conspicuous, caused them to be at once counted for him. The same thing exactly seems to have occurred on the recount, when the Judge, without observing

the two crosses, handed all four ballots, as Boyd ballots, to McKay's agent for examination, and when two of them escaped the notice of the agent also, and were not discovered until after a second examination by the agent of Boyd. Under these circumstances, it appears to me there is hardly room even for a suspicion that the marks complained of were made after the counting of the votes.

Mr. McPherson argued that the condition in which the ballots were found was very suspicious. There appear to have been two (a) packets furnished to the deputy returning officer, with printed blank indorsements thereon. He put the ballots in one and sealed it; but he filled up the blanks on the other with all the proper indorsements required by sec. 116 of the Act, instead of upon the first. This seems to me to have been a mere mistake; nor can I see what connection it could have with the alleged falsification of the four ballots.

I am of opinion that the Judge rightly disallowed these four ballots.

Owen Sound, 5, No. 1293. This was a distinct cross for McKay, and an obliterated cross in Boyd's division. I think it was rightly allowed.

Owen Sound, 4 A., No. 719. Marked for McKay, but having the word "McKay" written on the back. I think the Judge should not have allowed it. See on this point judgment in the *Lennox* case.*

Owen Sound, 4 A., No. 861. Marked for McKay with a very distinct cross, and having a very faint cross in Boyd's division. The Judge allowed it, thinking the faint cross was an impression of the other made by folding. I have examined this ballot with great care, and am unable to agree that the one cross is an impression of the other. I think this decision wrong, and that the vote should have been disallowed.

Owen Sound, 1, No. 8. A perpendicular line, no attempt to make a cross; rightly rejected.

Owen Sound, 3, No. 595. A horizontal line; rightly disallowed.

* Delivered by MACLENNAN, J.A., on the same day as his judgment in this case.

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Owen Sound, 4, No. 1082. Also a straight slanting line; properly disallowed.

Owen Sound, 10, No. 2650. Properly marked for McKay, but having words "Objection—No. 1 (Boyd)" in pencil on the back over the initials "F.C." These are evidently the initials of the deputy returning officer, whose initials are also on the back in another place. I think the words were placed on the ballot by the deputy returning officer, and so they do not avoid it. I think it was rightly allowed by the Judge.

Owen Sound, 10, No. 2671. A perpendicular straight line for Boyd; rightly rejected.

Sydenham, 2, No. 3934. A line; rightly disallowed.

Sarawak, 3, No. 8006; St. Vincent, 9, No. 6406; Keppel, 3, No. 6816; and Meaford, 2, No. 4816. Each of these was marked by placing the cross on the back, and was rightly disallowed.

St. Vincent, 5, No. 5912. A distinct cross for Boyd, and an indistinct one for McKay; rightly disallowed.

Meaford, 4 A., No. 5027. Several tremulous connected marks in McKay's division. I think an evident cross, and rightly allowed.

Meaford, 6 A., No. 5278. A strongly marked cross for McKay, and a thin faint upright pencil mark on the upper edge of the ballot paper in Boyd's division, not indicative of any intention to make a cross. I think rightly allowed.

Meaford, 6 A., No. 5289. A distinct cross for McKay, and in the same division another slight irregular pencil marking; I think rightly allowed.

Meaford, 6 A., No. 5298. A distinct cross for McKay, and in the same division a series of slight cloudy formless pencil markings. I think rightly allowed.

Keppel, 3, No. 6764. The mark on this ballot consists of two lines lying very close to each other, but both distinctly visible in Boyd's division. The lines slant from right to left, one is a little shorter than the other. From the top and for a little more than a third of their length they appear to coincide, and then diverge at a very acute angle. I think the mark was made by two separate strokes of the pencil.

The judgment of the late Chief Justice Ritchie in the *Bothwell Case* (1884), 8 S.C.R. 676, 696, concurred in on this point by Gwynne and Strong, JJ., though not binding on me, is of very great weight in favour of the validity of this ballot. The Chief Justice says: "I think that whenever the mark evidences an attempt or intention to mark a cross, though the cross may be in some respects imperfect, it should be counted." I think there is evidence here of that intention, and that the vote should have been allowed for Boyd.

The result is that two of the votes counted for McKay should be disallowed, and one which was disallowed to Boyd should be counted for him, and McKay's majority is thereby reduced to two.

McKay's appeal came on for hearing before MACLENNAN, J.A., on the 10th July, 1902.

G. H. Watson, K.C., *W. H. Wright*, and *Grayson Smith*, for McKay.

S. H. Blake, K.C., *E. E. A. DuVernet*, and *Eric N. Armour*, for Boyd.

Certain objections were made on behalf of Boyd, which are referred to in the judgment delivered later in the same day.

July 10. MACLENNAN, J.A.:—After I had disposed of the appeal of Mr. Boyd, which left Mr. McKay still with a majority of two, Mr. Watson, counsel for Mr. McKay, claimed the right of proceeding with his appeal. This was opposed by Mr. Blake on two grounds: first, that McKay's notice of appeal was not signed by himself personally, but by his solicitors on his behalf; and, secondly, because, Mr. McKay having a majority, the further proceeding with his appeal could not alter the result, and was useless.

The first objection was rested on the language of sec. 129 (1)* of the Election Act, which authorizes the candidate

*129.—(1) In case either of the candidates desires to appeal from the decision of the County or District Judge on a recount, he may do so by giving notice in writing to the other candidate and to the Judge of his intention within two days after the completion of such recount, and he may by the notice limit the appeal to certain specified ballots. The notice may be served upon the candidate personally, or upon the solicitor who acted for him upon the recount by leaving the notice with such solicitor personally or at his office.

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to appeal by giving a notice in writing, without expressly authorizing the notice to be given by an agent or solicitor; while it expressly authorizes the notice to be served upon the solicitor of the other candidate. I overruled the objection, thinking it of no weight whatever.

I also overruled the other objection, thinking that the right to appeal from the recount of the county Judge was clearly given to either candidate, by sec. 129 (1)*, irrespective of which of them had a majority; and that by sec. 129 (5) the Judge is required "to recount the ballots or such of them as are the subject of appeal," and to certify his decision. It seemed to me also that, having regard to the provisions of sec. 172,† a successful candidate ought to have the right to have the full tale of his lawful majority established by a recount.

On proceeding with Mr. McKay's appeal, I allowed the same in respect of four ballots, disallowing it in respect of a number of others.

At this stage counsel for Mr. Boyd claimed the right to object to certain other ballots, not previously objected to. Mr. Watson resisted this, on the ground that Boyd's appeal had been closed and disposed of. I held, however, that the appeals on both sides were still open, neither of them having been limited to particular ballots, for the reasons already mentioned.

On the part of Mr. Boyd five further ballots were then objected to, of which objections only one was allowed.

The result of both appeals, therefore, is that each candidate has succeeded in respect of four ballots, and the majority remains as it was found by the learned County Judge, namely, a majority of five for McKay.

I think there should be no costs to either appellant.

† 172. To prevent the expense and trouble of new elections when unnecessary and useless; in case of a corrupt practice or practices being committed by an agent without the knowledge and consent of the candidate, if the corrupt practice or practices was or were of such trifling nature, or was or were of such trifling extent, that the result cannot have been affected, or be reasonably supposed to have been affected by such practice or practices, either alone or in connection with other illegal practices at the election, such corrupt practice or practices shall not avoid the election.

E. B. B.

[STREET, J.]

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July 11.

Water and Watercourses—Injury to Land by Flooding—Claim for Damages—Summary Procedure—Costs of Action—Erection and Maintenance of Dam—Liability of Owners—Tolls—Liability of Lumbermen Using Dam.

In an action by the owner of land upon a river against the original defendants for flooding such land by a dam, it appeared that the dam was the property of an improvement company, incorporated under the Timber Slide Companies Act, R.S.O. 1897, ch. 194, and that the original defendants had used it for the purpose only of floating logs down the river; and the improvement company were added as defendants:—

Held, that, although (as decided in *Blair* v. *Chew* (1901), 21 C.L.T. Occ. N. 404) a plaintiff is not bound to proceed summarily upon a claim such as this, under R.S.O. 1897, ch. 85, but has a right to bring an action in the ordinary way, yet, in the absence of any good reason for not proceeding under the special Act, a plaintiff who brings an action should not be allowed the costs of doing so.

2. There is nothing in the Act under which the added defendants were incorporated which confers upon them any right to flood private property, unless they have first taken the steps authorized by the Act for expropriating the property or settling the compensation to be paid for flooding it, which these defendants had not done.

3. Nor were the defendants assisted by secs. 15 and 16 of R.S.O. 1897, ch. 140, for, even if the dam was erected before the plaintiff's purchase of his property from the Crown, there was nothing to shew that the price he paid was reduced in consequence.

4. But sec. 1 of R.S.O. 1897, ch. 142, places the public advantage of allowing lumbermen to use rivers and streams as highways for carrying their logs to a market, above the private damage and inconvenience which may necessarily be caused to individual riparian proprietors by their doing so; and the original defendants were not liable for any damage sustained by the plaintiff by reason of their having, during any spring, autumn, or summer freshet, caused damage to the plaintiff by using or repairing or maintaining any dam necessary to facilitate the transmission of their timber down the stream.

5. The rights given to persons desiring to float their own timber down a stream should not, however, be extended to companies incorporated for the purpose of making a profit by improving streams and charging tolls to lumbermen desiring to use them; and this view is strengthened by sec. 15 of R.S.O. 1897, ch. 194.

ACTION for damages for flooding plaintiff's land. The facts appear in the judgment.

The action was tried before STREET, J., without a jury, at Parry Sound, on the 14th May, 1901.

O. M. Arnold, for the plaintiff.

W. L. Haight, for the defendants.

July 11. STREET, J.:—The plaintiff was the owner of land upon the Seguin river, and brought this action against the administratrix and the administrators of the estate of William

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Peter, and against the Parry Sound Lumber Company, for flooding his land by a certain dam upon that river, which he alleged was maintained and used by the said William Peter in his lifetime and by the Parry Sound Lumber Company.

At the trial it appeared that the dam in question was the property of the Parry Sound River Improvement Company, a company incorporated under the Timber Slide Companies Act, R.S.O. 1897, ch. 194, in the year 1883, and that William Peter and the Parry Sound Lumber Company had used it for the purpose only of floating timber and logs down the Seguin river, occasionally repairing it for and at the expense of the Parry Sound River Improvement Company. It appeared, further, that the plaintiff had from time to time made claims upon the latter company for the annual damage claimed by him from the raising of the dam in the spring, when the logs were being floated down the stream, and that the damages claimed had been settled for in full down to the month of December, 1898, by the Parry Sound River Improvement Company, against whom the claim was made. The present action was brought on the 23rd March, 1901, but the last mentioned company were not parties to it at the time of the trial of the action. After the argument at the conclusion of the trial it was agreed between the solicitor of the plaintiff and the Parry Sound River Improvement Company that the latter company should be added as parties defendants, and they were accordingly added on the 4th September, 1901, and the plaintiff amended his statement of claim by alleging that they owned the dam and charged toll to the other defendants for using it. The added defendants admitted that they maintained the dam and charged their co-defendants toll for it; and they relied upon the powers conferred upon them by the Act under which they were incorporated as a defence.

The original defendants with their original statement of defence brought into Court $142, as being a sufficient sum to satisfy any claim of the plaintiff, and by the amended statement of defence, after the addition of the Parry Sound River Improvement Company as defendants, this payment into Court was attributed to them as well as to the other defendants.

Finally, on the 28th April, 1902, the parties all signed a consent that the evidence taken at the trial should be treated as if the Parry Sound River Improvement Company had then been parties to the action, and that the matters in question should be determined and disposed of upon the evidence already given.

By R.S.O. 1897, ch. 85, special provisions are made for the purpose of disposing in a speedy and inexpensive manner of claims for damages such as those in the present case by summary application to the Judge of the district court.

It is quite true that it has been held by a Divisional Court in *Blair* v. *Chew* (1901), 21 C.L.T. Occ. N. 404, that a plaintiff is not bound to proceed under the provisions of this Act, but has a right to bring an action in the ordinary way. In my opinion, however, in the absence of any good reason for not proceeding under the special Act, a plaintiff who adopts the more expensive method of bringing an action should not be allowed the costs of doing so, because the Legislature have plainly intended that the less expensive remedy should in ordinary cases be adopted.

I think there is no doubt, upon the evidence, that the effect of the dam across the river below the plaintiff's land has been to throw upon him at certain seasons a larger quantity of water than would naturally be there, and to inflict upon him a certain amount of injury and inconvenience. To cause this injury and inconvenience is *primâ facie* a wrongful act, and the plaintiff is entitled to damages, unless the defendants or those who have done the act are able to shew some authority for doing it which deprives it of its wrongful character.

There appears to be nothing in the Timber Slide Companies Act, R.S.O. 1897, ch. 194, under which the defendants the Parry Sound River Improvement Company are incorporated, which confers upon them any right to flood private property, unless they have first taken the steps authorized by the Act for expropriating the property or settling the compensation to be paid for flooding it, and it is admitted that this has not been done. All that they appear to have done has been to agree with the plaintiff, after inflicting certain damage upon him, as to the amount of the damage and to pay him the amount so

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agreed upon. Nor are the defendants, or any of them, assisted by the 15th and 16th sections of R.S.O. 1897, ch. 140, for, even if I could assume that the dam in question was erected before the plaintiff's purchase from the Crown of his property, there is nothing before me to shew that the price he paid was reduced in consequence.

Under the 1st section of the Rivers and Streams Act, R.S.O. 1897, ch. 142, however, it is declared that all persons have the right *during the spring, summer, and autumn freshets* to float logs, rafts, and timber down all rivers, creeks, and streams, and to construct dams where necessary in order to facilitate their doing so, doing no unnecessary damage to the river, creek, or stream or the banks thereof. By sec. 11 persons who have constructed dams or other river improvements are bound to allow others to use them for the purpose of floating their logs, etc., paying reasonable toll for the use of the improvements and doing no unnecessary damage.

The 1st section of ch. 142, R.S.O., seems clearly intended to place the public advantage of allowing lumbermen to use rivers and streams as highways for carrying their logs to a market, above the private damage and inconvenience which may necessarily be caused to the individual riparian proprietors by their doing so; and I think it clear, so far at all events as the defendants other than the Parry Sound River Improvement Company are concerned, that they can not be held liable for any damage sustained by the plaintiff by reason of their having during any spring, autumn, or summer freshets caused damage to the plaintiff by using or repairing or maintaining any dam necessary to facilitate the transmission of their timber down the stream.

The position of the Parry Sound River Improvement Company is somewhat different. They have erected the dam and maintained it, not for the purpose of floating their logs down it, but for the purpose of taking tolls from other persons desiring to float their logs down it. The argument is very strong that the 1st section of the Act, in so far as it authorizes interference with private rights, should receive a strict construction, and that the rights given to persons desiring to float their own timber down a stream should not be extended to

companies incorporated for the purpose of making a profit by improving streams and charging tolls to lumbermen desiring to use them. This view is strengthened very greatly by the 15th section of the Timber Slide Companies Act, R.S.O. ch. 194, which provides that "No such company shall . . injure any private property . . without having first obtained the consent of the owner, or occupier thereof, . . except as in this Act provided." The exception here referred to is the case of lands expropriated by the company under the compulsory powers contained in the Act. It is certainly an anomaly that a lumberman desiring to float his logs down a stream may dam back the water upon a riparian owner if necessary, without being liable in damages for doing so; while the same act, if done by a company formed for the purpose of doing it, with the same object in view, renders the company liable; but I can see no escape from the position as the law now stands.

The plaintiff is a riparian owner upon the river Seguin, and a part of his land is so low as to be very nearly down to the level of the river at its normal summer height, and to be under water in times of freshet. The defendants the Parry Sound River Improvement Company built or acquired from another company a dam below the plaintiff's land across the river, built with an opening in the centre which could be closed with stop logs when it was desired to raise the water. When the stop logs were out, all that remained of the dam at this point was the "bed timber," a permanent part of the dam lying on the top of the rock at that point, and about 1 foot 2 inches high. The result of this would be, at times when there was more water coming down the stream than could escape through the loose framework of the dam, to back the water to the depth of about 3 inches on the lowest part of the plaintiff's land. No levels had been taken by either party, and there was no accurate evidence upon the point, but this is as near the result as I can arrive at it from the evidence. In addition to this, the effect of confining the flow of the water to the opening in the dam after the stop logs had been taken out, was to prolong to some extent the period of high water upon the plaintiff's property. The evidence satisfied me that the dam as built was necessary for the purpose of enabling the lumbermen to get their timber down

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the river, and that no unnecessary damage had been inflicted upon the plaintiff; nor does it appear that the floating of the timber was prolonged beyond the subsidence of the spring freshets, nor that the stop logs were kept in the dam after their proper purpose had been served.

Under these circumstances, then, it appears to me that the defendants other than the Parry Sound River Improvement Company cannot be held liable, because all that they did is declared by sec. 1 of ch. 142, R.S.O., to be lawful, and the action must be dismissed as to them with costs.

The added defendants, the Parry Sound River Improvement Company, are liable to the plaintiff for the injury caused by this dam to his land, and the claim is put forward as one for certain annual damage done, and the defendants, accepting that as the proper method of estimating the damage, have paid into Court $142 as sufficient to cover it.

I think it must be determined that the plaintiff has accepted the sum of $30.75 in full of his damages to the end of the year 1898, and that his claim must be limited to the damage done during the years 1899 and 1900, for the present action was begun in March, 1901.

The plaintiff appears to have made extravagant claims to compensation, judging not only from the evidence at the trial but also from his own claims made in February, 1897, and in November, 1898.

It was conceded at the trial before me that the annual damages to his crops, for which he claimed $9.30 per acre, should be fixed at $2.50 per acre, and that the annual damage to his trees, for which he claimed $1 per acre, should be reduced to 12½c. per acre. Then three items, amounting to $45 per annum, of damages which had never been claimed before, were abandoned. The remaining items were $8 per annum for repairing fences, $15 per annum for nuisance arising from smell from backwater, and $280 for extra cost of bridges built by plaintiff. The $8 per annum for repairing fences was allowed; the $15 for smells was disputed; and $50 was allowed in respect of the extra cost of the bridges.

In regard to the nuisance from smell, I cannot find that any smell or nuisance said to arise from the flooding of the land

should be charged to the defendants. The plaintiff's flats are to a large extent low, wet land, and the evidence has not satisfied me that the bed timber of the dam has the effect of increasing the wet area so much as to add sensibly to the exhalations from it. Then, I think the estimate of $50 made by Mr. Armstrong, the sheriff of the county, who went out at the defendants' request to look into the plaintiff's claim and to fix it at a proper sum, was reasonable for any increased outlay upon the larger bridge. The claim made was for $240 for the increased outlay rendered necessary by the increased width of the branch of the river, due, it was said, to the dam of the defendants the Parry Sound River Improvement Company. But, as I understand the evidence, it was not the framework of the dam with the stop logs out which so greatly increased the volume of water in this branch of the stream, but it was the insertion of the stop logs by the other defendants for the purpose of floating down their logs during and just after the height of the freshets. This, as I have pointed out, was a lawful act, and, no unnecessary damage having been done by it, the plaintiff is bound under the law to submit to the inconvenience. The defendants the Parry Sound River Improvement Company have only maintained the framework of the dam, the result of which is to increase the volume of water to a very small extent, and, therefore, I think the allowance of $50 is ample for the purpose for which it is offered. I see no reason for allowing anything in respect of the smaller bridge.

I think, therefore, that the sum of $142 paid into Court was sufficient to cover the plaintiff's damage for the years 1899 and 1900, as well as his increased outlay upon the bridge.

There will be judgment for the defendants other than the Parry Sound River Improvement Company with costs; and judgment for the plaintiff for $142 against that company without costs, that being the sum paid into Court, and which is to be applied in payment *pro tanto* of the costs payable by the plaintiff.

T. T. R.

[STREET, J.]

1902

July 9.

GILLETT v. LUMSDEN BROTHERS.

Trade Mark—"Cream Yeast"—Protection—Acquisition of Right by User—Abandonment—Injunction.

The words "cream yeast" are not the proper subject of a trade mark, being common words of description.

Partlo v. *Todd* (1887), 14 A.R. 444, and *Provident Chemical Works* v. *Canada Chemical Co.* (1901), 2 O.L.R. 182, followed.

But the plaintiff's yeast having acquired a reputation in the market under the name of "cream yeast," that name was his property as against persons seeking to use it for the purpose of selling other goods of the same character, and he was entitled to have the defendants restrained from so using it.

The fact that the plaintiff had not for some years before action sold many boxes of the article did not shew an abandonment of the right to use the name in connection with the goods, the plaintiff having always been ready to furnish the article when it was asked for.

ACTION to restrain the defendants from infringing a trade mark, tried before STREET, J., at the Toronto non-jury sittings on the 18th March, 1902.

C. A. Masten and *J. H. Spence*, for the plaintiff.

F. C. Cooke, for the defendants.

The facts are stated in the judgment.

July 9. STREET, J.:—The plaintiff complains that the defendants have infringed a registered trade mark of his, and have sold their goods under a name calculated to deceive purchasers of their goods and to lead them to believe that they were purchasing goods made by the plaintiff.

The plaintiff on the 27th July, 1877, registered his trade mark as "Gillett's Cream Dry Hop Yeast," stating that what he especially wished to secure were the word "Gillett's," as manufacturer or as a brand for "Dry Hop Yeast," and the word "Cream" as applied to yeast.

The plaintiff sold large quantities of goods with this label down to the year 1885, when he began selling the same goods marked "Royal Yeast," and gradually gave up the sale of those marked "Cream Yeast," although he still kept the original labels in stock and affixed them to the packages upon the rare occasions when "Cream Yeast" was asked for.

In 1894 the plaintiff registered another trade mark with the same essential features as that of the year 1877, and in the year 1894 sold about 200 boxes of it. From the end of 1894 down to the end of 1900, there seems to have been few sales of it, but during the year 1891 many sales were made, as appears by the actual orders for it, which were given in evidence.

In January, 1901, the defendants began to sell yeast cakes under the name of "Jersey Cream Yeast," put up in packages marked with their own name as manufacturers. There was no attempt at an imitation of the plaintiff's packages in shape or otherwise, but they have evidently copied verbatim portions of the printed directions for use marked upon the plaintiff's packages, so that it is clear that in preparing their label they had the plaintiff's labels before them. The defendants swore that when they adopted the name of "Jersey Cream Yeast" they did not know that any other article called "Cream Yeast" was on the market; that they had asked at several grocers for it and could not hear of it.

In May, 1901, the plaintiff wrote to the defendants warning them against continuing the sale of their Jersey Cream Yeast under that name, as it was an infringement of his trade mark, and threatening proceedings. The defendants replied refusing to withdraw their article from sale.

The defendants, since the year 1892, have owned a trade mark for baking powder, being the words "Jersey Cream Baking Powder," with a picture of two Jersey Cows and a milk-maid, but until January, 1901, they had never applied the words "Jersey Cream" to yeast cakes.

There was evidence that the plaintiff's goods were usually known in the trade and among their customers as "Cream Yeast," and the orders put in evidence were orders for "Cream Yeast."

It was stated in evidence on the part of the plaintiff that the word "Cream" did not mean that cream was used in the preparation of the yeast cakes, but that it was intended to describe the appearance given to the flour after being mixed with the yeast. The defendants on the other hand said that Jersey cream was actually used in the preparation of their yeast.

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I am of opinion that the words "Cream Yeast" are not the proper subject of a trade mark, being common words of description: *Partlo* v. *Todd* (1887), 14 A.R. 444, 452; *Provident Chemical Works* v. *Canada Chemical Company* (1901), 2 O.L.R. 182, 185.

The plaintiff must therefore fail upon the branch of his case which depends upon his ownership of the registered trade mark. I think, however, that he is entitled to succeed upon the ground that his yeast had long ago acquired a reputation in the market under the name of "Cream Yeast," and that name is his property as against other persons seeking to use it for the purpose of selling other goods of the same character: Kerly on Trade Marks, 2nd ed., p. 475. The evidence that he had not for some years before 1901 sold many boxes of the article does not shew an abandonment of the right to use the name in connection with the goods, for he has always been prepared to furnish it upon the few cases between the end of 1894 and the beginning of 1901, when it was asked for: Kerly on Trade Marks, 2nd ed., p. 346.

There should, therefore, be a declaration that the defendants, by using the word "cream" as applied to their yeast, have infringed the plaintiff's rights, and a judgment for a pepetual injunction restraining them from doing so, and the defendants must pay the costs of the action.

T. T. R.

[STREET, J.]

DOHERTY ET AL. V. MILLERS AND MANUFACTURERS INS. CO.

1902

June 27.

Insurance—Fire Insurance—Mutual Plan—Annual Renewal—Proposal for Increased Premium—Non-acceptance—Condition of Payment in Advance—Delivery of Receipt—Waiver.

Two policies on the mutual plan, issued in 1898 and 1899, provided for insurances for the original period of one year and "during such further period or periods for which the assured shall from time to time have paid in advance the renewal premium or premiums required by the company, and for which the company shall have issued a renewal receipt or receipts." The policies were delivered to the plaintiffs, without prepayment of any cash premium, and without the previous delivery of the premium notes in consideration of which the policies purported to be issued; but the cash was paid and the notes delivered soon afterwards.

On the 27th October, 1900, the executive officer of the defendants wrote to the plaintiffs enclosing a receipt for $363.23, being the amount of the cash premium for the renewal of both policies. The letter was on a printed form, stating that a receipt "renewing" the policies was enclosed, and asking the plaintiffs to remit the amount of the cash premium. It also asked for new premium notes, and stated that the old ones were enclosed, as they were. The plaintiffs retained the receipts, but did not send the money or the notes until about the 20th December, 1900.

On the 28th October, 1901, the same officer again enclosed renewal recepts in a letter on the same form as above, but the amount of the cash payment was higher, and on the 6th November, 1901, the plaintiffs wrote to the defendants calling attention to the increase; the officer answered the next day that the defendants had been obliged to increase the rate; and on the following day the plaintiffs wrote as follows: "If you cannot do better we will have to accept, but we are going to ask you to reconsider the matter and meet us in this if at all possible . . . Kindly give this your consideration and let us hear from you." On the 11th November the officer wrote to the plaintiffs: "The consulting board carefully considered your risk before making the advance in rate they did, and had no alternative but to do so to procure the re-insurance we required. Trusting this explanation will prove satisfactory to you." No answer was made by the plaintiffs to this.

On the 16th November, 1901, a fire took place, and damage was done to the property covered by the defendants' policies. Two days afterwards the plaintiffs sent the defendants a cheque for the amount of cash demanded and new premium notes, but the defendants returned them.

The defendants re-insured their risk as soon as the premiums became payable, and had not cancelled these re-insurances down to the time of the trial:—

Held, that no contract existed between the plaintiffs and defendants for an insurance for the year beginning on the 31st October, 1901.

Semble, that if the plaintiffs had unqualifiedly accepted the renewal terms, the condition providing for payment in advance of the cash premium would have been waived; for the intention of the defendants in delivering the receipt, where the money had not in fact been paid, was to keep the policy in force and to give the plaintiffs credit for the amount.

AN action to recover the amount of a loss by fire insured against by two policies issued by the defendants.

1902

DOHERTY v. MILLERS INS. CO.

The action was tried before STREET, J., at the Goderich Assizes on the 17th June, 1902, without a jury.

W. Proudfoot, K.C., for the plaintiffs.

W. Barwick, K.C., for the defendants.

The facts are stated in the judgment.

June 27. STREET, J.:—The plaintiffs are manufacturers at Clinton, Ontario; the defendants are an insurance company, carrying on business, both upon the mutual and the stock systems, having their head office at Toronto.

On the 31st October, 1898, the defendants issued their policy on the mutual plan to the plaintiffs for an insurance of $20,000 upon their property; and on the 31st October, 1899, a further policy to the amount of $10,000 was issued by them to the plaintiffs. Each of these policies was issued and delivered by the defendants to the plaintiffs without prepayment of any cash premium, and without the previous delivery by the plaintiffs to the defendants of the premium notes in consideration of which the policies purported on their face to be granted; but cheques dated the 31st October, 1898, for the cash portion of the premium on the $20,000 policy, and the 31st October, 1899, for the cash portion of the renewal of that policy and the first premium on the $10,000 policy, were sent on or about their respective dates, along with the required premium notes, to the company.

On the 27th October, 1900, Mr. Hugh Scott, the managing director and secretary of the defendant company, wrote to the plaintiffs enclosing receipt for $363.23, being the amount of the cash premium for the renewal of both policies: his letter was on a printed form as follows:—"Enclosed please find receipt renewing policies No. 3092 and 2782, lapsing on 31st inst. Kindly remit amount of premium therefor, $403.58, less 10% bonus dividend. As the Insurance Department now requires us to take a new premium note or undertaking on the renewal of each policy, we enclose the old form, for which please return us duly executed the new undertaking enclosed." The plaintiffs retained the receipts, but did not either send the money or the undertakings, until on the 19th December, 1900, Mr. Scott

wrote them as follows: "Dear Sirs: We are drawing on you at sight for $364.12, being premium on renewal of policies 2782 and 3092, less bonus dividend 10%, and adding bank charges, which kindly honour on presentation. As yet you have not returned us the new undertakings enclosed with the renewal receipts for above policies. Kindly do so and oblige yours faithfully, Millers and Manfrs. Ins. Co. Hugh Scott, Mgr. and Secy."

On the 20th December, 1900, the plaintiffs replied: "Replying to your letter of 19th, we will accept your sight draft premium on policies 2782 and 3092. We enclose herewith the new undertakings signed as requested. These should have been sent you before but were overlooked."

The plaintiffs accepted and paid the defendants' sight draft for the premiums, $364.12, and on 22nd December, 1900, Mr. Scott wrote them: "Undertakings for renewals of policies No. 2782 and 3092 duly to hand, with thanks."

On the 28th October, 1901, the defendants again enclosed receipts to the plaintiffs renewing the policies for a year from 31st October, 1901, and writing upon the same printed form as that above quoted. The amount of the cash payment mentioned in the receipts so enclosed was considerably larger than it had been the year before, and on the 6th November, 1901, the plaintiffs wrote the defendants calling attention to the increase and saying that, as it was an error, they wished corrected receipts sent, and they would return those which had been sent them. On the 7th November, 1901, Mr. Scott wrote that the company had been obliged to increase the rate payable by the defendants. On the 8th November the plaintiffs replied: "Of course we notice your remark that you had to raise the rate to get the re-insurance. *If you cannot do better we will have to accept, but we are going to ask you to reconsider the matter* and meet us in this if at all possible. Kindly give this your consideration *and let us hear from you.*"

On the 11th November Mr. Scott wrote the plaintiffs: "The consulting board carefully considered your risk before making the advance in rate they did, and had no alternative but to do so to procure the re-insurance we required. Trusting this explanation will be satisfactory to you."

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No answer was made by the plaintiffs to this letter, and on the 16th November, 1901, a fire took place at their works, and the damage done by it to the property covered by the defendants' policies was $24,523.75.

On the 18th November, 1901, the plaintiffs telegraphed to the defendants: "Have had small fire in one of our factories. Kindly send adjuster at once."

On the same day they wrote to the defendants enclosing a marked cheque for the amount of the cash premiums upon the two policies and the premium note undertakings which had been in their hands since the receipt by them of the defendants' letter of the 28th October, 1901.

The defendants sent an agent to the plaintiffs at once, who informed them that the defendants considered they were not under any liability upon the policies, the fire having taken place before the premiums were paid or any reply made to the defendants' letter of the 11th November, and on the 21st November, 1901, they returned to the plaintiffs the cheque and premium notes.

The defendants were in the habit of re-insuring, with other companies with which Mr. Hugh Scott was connected and which had their head offices in the same room with the defendant company, the risks they insured under the policies they issued: they re-insured their risk under the policies to the plaintiffs as soon as the premiums became payable, and had not cancelled these re-insurances down to the time of the trial.

The form of each policy provided for the insurance for the original period of one year and "during such further period or periods for which the assured shall from time to time have paid *in advance* the renewal premium or premiums required by the company, and for which the company shall have issued a renewal receipt or receipts."

The two policies together covered 30/63rds of each item mentioned in the schedule of property attached to them, the whole of the items mentioned in the schedule amounting to $63,000. In other words, the defendants' liability upon each item of $10,000, for instance, was limited to 30/63rds of that item.

It appears to be well established that the executive officer of a company may waive a condition providing for the payment of premiums in advance, so that the mere fact that by the terms of the policy payment of premiums upon renewal is made a condition to the liability of the company attaching, may be met by shewing either an express or an implied waiver. In the present case we have the circumstance that the company by its managing director, who was also its secretary and executive officer, upon each occasion of the approaching termination of the current period of liability, sent to the plaintiffs the company's receipts for the cash premium and forms for the new premium notes without any formal request for payment: and the further circumstances that in the year 1900 the premium due on the 31st October was not paid until the 20th December, and that no complaint or suggestion was made that there had been any default. It is contended by the plaintiffs that these facts shew that a credit was intended to be given by the defendants to the plaintiffs for the cash premium and that the provision for payment in advance had been waived.

What is the meaning and effect of the delivery by a company to its insured of a receipt for the renewal premium upon a policy, where the money has not in fact been paid? The practice is very common; the defendants' printed forms shew it to have been their custom; and the only conclusion at which I can arrive is that it is intended to keep the policy in force in favour of the insured in case he shall omit to forward the renewal premium to the company in due time; and this involves the giving of credit to the insured for the amount of the premium. If this be not the intention to be drawn from the act, I can find no other reasonable or satisfactory explanation of it, for if it be intended by the sending of the receipt merely to remind the insured that the payment is due, a simple notice to that effect would answer the same purpose. Then, if it is shewn, as it has been here, that the defendants had not asked the plaintiffs to pay the previous renewal until six or seven weeks after it had became due, and had then simply drawn for it without a word of remonstrance or complaint, there is a state of things upon which a jury, and therefore a

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Judge, would be justified in holding the existence of an understanding that a credit had been given for the premium until a demand should be made. See *Boehen* v. *Williamsburgh Ins. Co.* (1866), 35 N.Y. 131; Porter on Insurance, 3rd ed., pp. 82-3; *Washoe Tool Mfg. Co.* v. *Hibernia Fire Ins. Co.* (1876), 7 Hun 74; May on Insurance, 4th ed., vol. 2, sec. 360.

But the question to be determined here is not the simple one as to whether credit had been given for the premium due on the 31st October, 1901, but whether upon the correspondence I should hold that the plaintiffs had ever accepted the defendants' policy with the increased premium insisted upon, whether in fact any contract for the year beginning on the 31st October, 1901, had ever been completed. After much consideration, I have arrived at the conclusion that no contract existed between the plaintiffs and the defendants for an insurance for that year. The defendants, without any notice to the plaintiffs, increased the amount they demanded for insuring the plaintiffs' property, and inserted the increased amount in the receipts they sent him. The plaintiffs wrote saying this was a mistake, and asked the defendants to send receipts for the proper amounts: the defendants wrote back explaining that it was necessary for them to increase the rate; then the plaintiffs, on the 8th November, replied, and it is upon the proper construction to be placed upon this letter that the question of contract or no contract hinges. They say, in effect, "if you cannot do better we shall have to accept, but we want you to reconsider the matter and when you have done so to write and tell us your final decision." This was not an unqualified acceptance of the defendants' proposal to insure them for the coming year at a new rate; it was not an acceptance at all of the new rate; it was a request for a reconsideration of the proposal, and that the result might be communicated to them, coupled with an intimation that they must ultimately accept the result, but it was not an acceptance in advance of the result. If after receiving Mr. Scott's letter of the 11th November, in which the company adhered to the increased rate, the plaintiffs had written to the defendants refusing to accept the insurance upon the new terms, I think it is clear that the company could not have insisted that the

plaintiffs had accepted the new terms and were liable to pay the new premium. Then the plaintiffs allowed seven days to pass after the final decision of the company as to the rate had been communicated to them, without any act or word of acceptance until the happening of the fire, which of course destroyed the subject matter, and it was then too late to accept the offer of the company.

For these reasons I think, as I have said, that there was no contract, and the action must, therefore, be dismissed with costs.

E. B. B.

[STREET, J.]

ALLAN ET AL. V. REVER.

1902
June 26.

Dower—Lease Made by Deceased Husband—Priorities—Assignment of Dower—Rights of Executor and Devisee—Devolution of Estates Act.

A dowress whose dower has not been assigned has no estate in the land out of which she is entitled to dower, but, as soon as her dower is properly assigned, she is entitled to claim possession of the land assigned to her, in priority to persons claiming under leases created by her husband, without her assent, during the coverture.

Stoughton v. *Leigh* (1808), 1 Taunt. 402, followed.

Where a testator, dying in August, 1901, devised land to his son, and probate of the will was granted to the executor named therein, and the son in April, 1902, executed a conveyance of a part of the land to the testator's widow for her life, as and for her dower, the executor not assenting thereto:—

Held, that the conveyance was of no avail; for the only person who could assign dower was the executor, in whom, under s. 4 of the Devolution of Estates Act, R.S.O. 1897, ch. 127, the whole inheritance of the testator vested.

ACTION to recover possession of land, tried on the 16th June, 1902, before STREET, J., at the Goderich Spring Assizes, without a jury. The facts are stated in the judgment.

W. H. Blake, K.C., for the plaintiffs.

A. Shaw, K.C., for the defendant.

June 26. STREET, J.:—The following facts were admitted or given in evidence:—

William Allan died on the 3rd August, 1901, seised in fee simple of 150 acres of land in the township of Howick. He

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left a will by which he devised this land to his son Andrew Allan in fee, and he appointed his said son Andrew Allan and one Thomas Ritchie to be his executors. He left a widow, Jane Allan, but made no provision for her in his will. On the 30th August, 1901, probate of the will was granted to Thomas Ritchie alone. On the 14th April, 1902, Andrew Allan executed a conveyance to his mother, Jane Allan, for her life, of a certain portion, being 50 acres, therein described, of the lands devised to him by the testator, as and for her dower in all the lands devised, and she released to him all claim to dower in the remainder of such lands. This conveyance recited that Jane Allan was entitled to dower in the lands devised by the testator, and that she had agreed with Andrew Allan, the devisee, to accept an assignment of the 50 acres in question, for her life, as and for her dower in the whole.

At the time of the execution of this conveyance Andrew Allan was, and is still, an infant under the age of 21 years.

The testator in his lifetime, that is to say, on the 20th September, 1900, had made a lease under seal to the defendant, Conrad Rever, of the 50 acres so assigned to Jane Allan for her dower, for the term of 5 years from the 1st March, 1901, at an annual rent, and such lease was in force and valid at the time of the death of the testator.

The present action is brought by Jane Allan, the widow, and Andrew Allan, the devisee, by his mother and next friend, Jane Allan, against the tenant, Conrad Rever, to recover possession of the 50 acres in question, the contention of the plaintiffs being that the testator in his lifetime could only make a lease subject to the inchoate right of his wife to dower, and that, after his death, and after a proper assignment to her of her dower, her title under such assignment prevailed against the right of the tenant under the lease.

The defendant claimed title under the lease from the testator, and further objected that no proper assignment of the dower had been made to the widow, because the executor was tenant of the freehold, and therefore the only person who could assign dower; and that, even if the devisee, Andrew Allan, were tenant of the freehold, he, being an infant, could not by deed assign dower.

The action was begun on the 1st May, 1902, and after the commencement of the action the executor, Thomas Ritchie, executed a deed poll declaring that he had assented and did assent to the devise of the said 150 acres of land to the said Andrew Allan, and that it was not necessary to sell the same for payment of debts or for any other purpose in connection with the estate; and he released and conveyed the said lands to the said Andrew Allan as devisee under the will; and he consented, if necessary, to be added as a party defendant in the action, submitting his rights to the Court.

This is an action to recover possession of land; the defendant denies the plaintiffs' title, and also claims the right to hold possession under a lease from the testator, whose original title is admitted by both parties.

A dowress whose dower has not been assigned has no estate in the land out of which she is entitled to dower, but, as soon as her dower is properly assigned, she is entitled to claim possession of the land assigned to her in priority to leases created by her husband, without her assent, during the coverture: *Stoughton* v. *Leigh* (1808), 1 Taunt. 402, 410.

The first question here is whether the widow's dower has been properly set apart and assigned to her. The assignment is to be made by the person entitled to the freehold.

Under sec. 4 of ch. 127, R.S.O. 1897, all estates of inheritance vested in any person shall on his death, notwithstanding any testamentary disposition, devolve upon and become vested in his legal personal representatives from time to time, and subject to the payment of his debts. The right to dower, or to compensation in lieu of it, is preserved to the widow by sub-sec. 2 of sec. 4; but it is at the same time expressly provided by sub-sec. 3 of sec. 11 of the same Act that the personal representative, without the consent of the widow, may be authorized to convey the land free from her dower.

Under the 4th section of the Act, I think it is clear that the whole inheritance of the testator vested in the executor, and that he became upon his appointment the tenant of the freehold; it was argued that because, under sec. 13 of the Act, the estate vested in him by the 4th section passes automatically away from him to the devisee at the end of the prescribed

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period (now three years*) unless a caution be sooner registered, therefore his estate must be taken to be an estate limited to him for a shorter term than that required to confer a freehold upon him. I cannot agree to this: I think the executor during the time he holds the estate holds the whole of the estate which the testator was possessed of when he died; that when the executor sells and conveys land to pay debts, he is transferring an estate which is vested in him, and not merely executing a statutory power to sell land the title to which is vested in the heir or devisee.

The only person, therefore, who could assign her dower to the widow here was the executor of the deceased; the devisee, Andrew Allan, had no power to assign dower, and his attempt to do so gave no estate to his mother. At the time this action was begun, therefore, she had no estate in the land, and had no right to recover possession of it; whether her title was affected by the subsequent assent of the executor, need not be here considered, for it cannot relate back to the commencement of the action so as to give her a title then. She must succeed or fail upon the title she had when she brought her action.

I think, therefore, that the plaintiffs have failed to prove themselves, or either of them, entitled to possession as against the defendant, and the action must be dismissed with costs.

* See 2 Edw. VII. ch. 17, sec. 3 (O.)

E. B. B.

[MEREDITH, J.]

RE CRAWFORD.

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June 21.

Will—Income of Estate to Widow—Power to Draw upon Real Estate on Insufficiency of Income—Right to Sell or Mortgage Real Estate.

A testator by his will gave to his wife the income derivable from his real and personal estate, and directed that if this was not sufficient to supply her wants the executors might for such purpose draw upon any of his property:—*Held*, that to supply such wants the executors were empowered to sell or mortgage the real estate.

THIS was a motion by way of originating notice under Con. Rule 938, pursuant to sec. 39 of the "Trustee Act," R.S.O. 1897, ch. 129, for the opinion, advice or direction of the Court, as to the power of the executor under of the will and codicil of Alexander Crawford, deceased.

By the will, which was dated March 30th, 1895, the testator, by the first three clauses thereof, gave to his wife Elizabeth Crawford the rents and profits of his real estate for her lifetime, and all interest in moneys which might remain after payment of all his just debts and funeral expenses.

By the fourth clause he directed that if his said wife should be "in need of more than the above income to supply her wants, my executors may draw upon such money as I may die possessed of, to supply her wants;" and by a codicil to the said will the testator directed that the said fourth clause of the said will "be further extended by adding the following: If the above bequests are not sufficient to supply the wants of my wife Elizabeth Crawford, my executors are hereby empowered to draw upon any of my property to supply those wants."

The testator died on the 29th January, 1896, and on the 20th March, 1896, probate thereof was issued to the executors named in the will, the plaintiffs being subsequently appointed in their place and stead.

The question for the opinion of the Court was, whether the executors under the powers conferred by the said will were authorized to resort to the real estate to supply the wants of the widow, and for such purpose to sell, mortgage, or otherwise dispose of such real estate.

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The motion was argued before MEREDITH, J., at the Weekly Court at London on 21st June, 1902.

J. C. Judd, for the executors.

W. H. Barnum, for the widow.

Glenn, K.C., for residuary legatees.

June 21. MEREDITH, J.:—The question is whether the executors are empowered by the will to resort to the testator's real estate in order "to supply the wants" of the widow.

The will provided that if the widow should be in need of more than the income given to her in it "to supply her wants," the executors might "draw upon such money" as the testator might die possessed of, "to supply her wants." By a codicil to that will the executors are empowered to draw upon any of his property to supply those wants.

The testator's first care, in his will and in that codicil, is that the wants of his widow shall be satisfied; and that which remained only is to go to his collateral relations.

The codicil makes it plain that the executors may have recourse to the real estate to supply the widow's wants, if need be.

The wants of the widow, in case of her needing more than is given to her in the first three clauses of the first paragraph of the will, are to be supplied by the executors by drawing upon the testator's property.

In the circumstances of this case the real estate can be drawn upon only by pledge or sale.

The executors have power to so draw upon it in the circumstances, and for the purpose mentioned; this confers on them implied power at least, to sell or mortgage, for that purpose, in those circumstances.

This may be expressed, in appropriate and usual form, as the opinion of the Court.

Costs out of the estate, those of the executors as between solicitor and client.

G. F. H.

[STREET, J.]

MACDONELL

v.

THE CORPORATION OF THE CITY OF TORONTO.

1902

June 25.

Local Improvements—Petition for—Municipal Act, R.S.O. 1897, ch. 223—Exempt Property — Municipality as Owner — Valuation of Land and Buildings.

In ascertaining whether a petition for a local improvement is sufficiently signed under the Municipal Act, R.S.O. 1897, ch. 223 by owners of the property intended to be benefitted, taxable persons and taxable property only are to be taken into account in arriving at the proportion.

And where the property of a municipality exempt from taxation was entered on the roll, the municipality as owner and the value of the property were excluded in arriving at the proportion required to make a good petition under the section.

The words "real property" in sec. 668 cover lands and buildings, which should both be taken into account in ascertaining the requisite proportion in value.

THIS was a special case stated between Alexander Macdonell, as a ratepayer, and the Municipal Corporation of the city of Toronto, which was argued in Court on the 10th June, 1902, before STREET, J.

The facts appear in the judgment.

Aylesworth, K.C., and *C. A. Moss*, for the plaintiff. The city of Toronto is placed on the assessment roll and was regularly assessed, all the details of the roll being regular and complete, and even if a mistake was made in putting the city on, the roll is binding and conclusive and shews ten owners. The petition was insufficiently signed, when only signed by six owners to be benefitted, two-thirds in number being required: R.S.O. 1897, ch. 223, sec. 668. The word "exempt" which was placed upon the roll makes no difference, as that word does not refer to the assessment, but merely to the collection of the taxes. The petition was also insufficiently signed in respect to the value, one half in value being required. The value of the buildings should not be taken into consideration as it is the land that is benefitted: Cooley on Taxation, p. 456; *City of Boston* v. *Shaw* (1840), 1 Metcalfe (Mass.), 130 at p. 138; *Re Robertson and City of Chatham* (1898), 30 O.R. 158, at p. 172. The words used in the statute are "real property" to be benefitted. These words

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are used by the Legislature both in the Municipal Act (sec. 668) and in the Assessment Act (sec. 2, sub.-sec. 9). In the latter it includes buildings, in the former it does not, and so they should not be taken into consideration in the value.

Fullerton, K.C., and *Caswell*, for the city of Toronto. The buildings should be valued as they really are more benefitted than the mere land. Improved property should have better access than vacant land. Buildings are increased in value by better access and so are benefitted. The assessor by an unauthorized act of his own, such as putting the city of Toronto on the roll in this case, cannot impose any burden on the city. The roll should only include taxable persons having taxable property: Assessment Act, sec. 13 (1) (*a*). There is no provision for the city signing the petition even if such was desired. "Real property" in the Municipal Act includes lands, tenements and hereditaments, and so includes buildings: while in the Assessment Act they are specifically included. Improvements were from 1866 to 1882 included in ascertaining the value: 29-30 Vict. ch. 51, sec. 301, sub-sec. 1; 36 Vict. ch. 48, sec. 464, sub-sec. 2 (O.); R.S.O. 1877, ch. 174, sec. 551, sub-sec. 2, but the words "exclusive of improvements," were omitted in the Act of 1882, 45 Vict. ch. 23, sec. 4 (O.), clearly implying that the Legislature intended to include improvements in the land values thereafter. The petition was sufficiently signed, both in respect to numbers and to value: *Re Toronto and The Consumers' Gas Co.* (1894), 30 C.L.J. 157 at p. 159.

Aylesworth, in reply. The fact that improvements are mentioned in the earlier Act and are now omitted shews an intention to exclude them.

June 25. STREET, J.:—The plaintiff is the "owner" within the meaning of sec. 668 of the Municipal Act, R.S.O. 1897, ch. 223, of a parcel of land on Huron street in the city of Toronto, in the block on that street bounded on the north by Cecil street and on the south by Baldwin street.

According to the last revised assessment roll there are nine persons, including the plaintiff, assessed as owners of property fronting on Huron street in the block above mentioned; the "City of Toronto" also appears upon the roll as owner of two

parcels of land fronting on Huron street in the same block, with the word "Exempt" opposite the name and the lot in each case.

Six of the persons so assessed as owners have petitioned the corporation of Toronto praying for the laying of an asphalt pavement upon Huron street, between Cecil street and Baldwin street, as a local improvement under sec. 668 of the Municipal Act.

According to the assessment roll the value of the lands owned by the six petitioners fronting on Huron street, apart from the buildings upon them, is $5,253, and the value of the buildings is $9,300, making the total value of land and buildings $14,553.

According to the same roll the value of the lands of the three owners, including the plaintiff, who have not joined in the petition, apart from the buildings on them, is $8,959, and the value of the buildings is $5,000; total value of land and buildings, $13,959. And the value of the two parcels of property belonging to the defendants, no buildings being erected thereon, is stated in the roll to be $3,060.

The question to be determined is whether, under these circumstances, the petition has been signed by two-thirds in number of the owners and one-half in value of the real property to be benefitted by the proposed improvement.

So far as the proportion of value is concerned, the plaintiff contends that only the value of the land, apart from the buildings, is to be taken into account.

In my opinion, this contention cannot be supported. The words used in sec. 668 are "one-half in value of such *real property*"; and "real property" in the interpretation clause, sec. 2, sub-sec. 8, of the Municipal Act, includes "lands, tenements and hereditaments and any interest or estate therein or right or easement affecting the same."

The definition of "real property" in the Assessment Act, ch. 224 R.S.O. 1897, sec. 2, sub-sec. 9, is specially made to include "all buildings or other things erected upon or affixed to the land"; but I am not able to bring myself to see that the greater particularity of this definition weakens in any way the comprehensive meaning of the words "lands, tenements and hereditaments" in the interpretation clause of the Municipal Act. These words undoubtedly are large enough to cover both

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the land itself and the buildings erected upon it, and must be so interpreted in my judgment. The figures would then stand as follows: The real property of the six petitioners, $14,553; the real property of the three who do not petition, $13,959; total of the nine persons, $28,512; one half of this, $14,256. Upon this basis, therefore, the six petitioners, representing $14,553 in value, have complied with the requirements of the sec. 668, so far as value is concerned.

If, however, the city is to be treated as an owner within the meaning of sec. 668 it is plain that the petition is not properly signed, either in point of numbers or value, for the whole value of the real property would then be $31,572, and the number of owners would be ten, and a compliance with the section would require the signatures of seven owners, representing $15,786 in value. The question, therefore, is reduced to this: Should the city be held to be an owner within the meaning of sec. 668 under the circumstances?

The difficulty here is created by the fact that the assessment roll in the present case has not been limited to taxable persons and taxable property, as required by sec. 13 of ch. 224, but has improperly been made to contain the name of the city of Toronto, who are not taxable persons, and their property which is not taxable property, but is specially exempt under sec. 7, sub-sec. 7, ch. 224 R.S.O. 1897, unless occupied by their tenant, which is not here the case. No objection has been made by any person to this error, and the roll in its present form has been finally revised.

The question is by no means free from difficulty. I think the proper method of solving it is to consider what the Legislature must be taken to have had in view when speaking of the assessment roll in sec. 668 of the Municipal Act, and whether every entry found upon the assessment must necessarily be treated as a part of it in construing that section.

Section 13 of the Assessment Act, ch. 224 R.S.O. 1897, prescribes what the assessment roll is to contain and limits its contents; it is evident that only "taxable persons" and taxable property are to be set down and valued in it, and not persons who are not subject to taxation, nor property which is by law exempt from taxation.

It is true that in case a person be set down as taxable in respect of property which is not subject to taxation, and he

omit to appeal from it, he may be held bound, but if his property be described on the face of the roll as property exempt from taxation, it is improperly on the assessment roll at all, and is not affected in any way by the fact of its being found there.

In the present case the assessor in assessing the lots fronting on Huron street has mentioned the city of Toronto as being the owner of certain vacant land, which he found fronting on the street and has placed a value upon it, but has been careful to note in the margin that it is "exempt," as, in fact, it is by virtue of sub-sec. 7 of sec. 7 of the Assessment Act. The entry of this land upon the roll seems to me, under the circumstances, not really to form a part of the assessment roll, for it is not intended that the land shall be assessed, or that any person shall be assessed in respect of it; it is a mere memorandum made by the assessor in passing, perhaps to shew better than by skipping over the parcels altogether, that they are not intended to be assessed to any person.

The entry of the lots has no more significance than if the assessor had merely made a note on the roll to the effect that these parcels being the property of the city are exempt from taxation.

In my opinion, therefore, the Legislature cannot be taken to have intended that any property exempt from taxation should be inserted upon the assessment roll, and, therefore, cannot be taken to have intended that the owners or the value of exempt property should be taken into account in arriving at the proportion required to make a good petition under sec. 668 of the Municipal Act.

It is unnecessary to consider whether local improvement charges are properly taxes or not; the assessment roll is the guide under section 668 as to the required proportion of owners and values. It is, however, worth attention that by sec. 679 the municipal council has authority by by-law to assess against the whole taxable property of the municipality the proportion of local improvements which would have fallen upon property which is exempt.

Under the terms of the special case there should, therefore, be judgment for the defendants with costs.

G. A. B.

[IN CHAMBERS.]

1902

July 3.

RE SNYDER.

Insurance—Life Insurance—Beneficiary Certificate—Designation of Beneficiaries —Indorsement—Will—1 Edw. VII. ch. 21, sec. 2, sub-sec. (7) (O.)—Infant Children of Assured.

A benefit society issued a beneficiary certificate payable to the wife of the assured at his death; she died; and he then (in 1895) indorsed on the certificate a direction that payment was to be made "to my children as directed by my will." The day before his death (in 1902) the assured made a will by which he directed that the whole of his estate should be divided amongst his children—there being both adult and infant children—in equal shares, but made no reference whatever to the benefit certificate or to the moneys payable thereunder:—

Held, that the infant children of the assured were entitled to the whole of the moneys, by virtue of the amendment made to the Insurance Act, R.S.O. 1897, ch. 203, sec. 151, sub-sec. (6), by 1 Edw. VII. ch. 21, sec. 2, sub-sec. (7).

MOTION on behalf of William Snyder, Herbert M. Snyder, and Alfred H. Snyder, the executors and trustees under the will of Simon Snyder, deceased, and on behalf of Minnie Emma Snyder and Alberta Lucina Snyder, the adult children of the said Simon Snyder, for an order directing payment out of Court to the first three named, as such executors and trustees, of the sum paid in by the Grand Lodge of the Ancient Order of United Workmen, pursuant to an order dated the 30th May, 1902, being the amount payable under a certain beneficiary certificate number 5288 issued by the society to the deceased, or for payment out of the shares of the adult children. The facts are stated in the judgment.

The motion was heard by MACMAHON, J., in Chambers, on the 27th June, 1902.

E. E. A. DuVernet, for the applicants.

F. W. Harcourt, for the official guardian, representing the infant children of the deceased.

July 3. MACMAHON, J.:—On the 9th December, 1881, the Ancient Order of United Workmen issued a beneficiary certificate to Simon Snyder for the sum of $2,000, which was payable, on the death of the assured, to his wife Elizabeth Snyder,

the beneficiary named in said certificate. The amount paid into Court was $2,000, less $25 costs allowed on the motion for leave to pay in.

Elizabeth Snyder died on the 10th March, 1889. Simon Snyder married a second time some years after the death of his first wife. After the death of his first wife Elizabeth, the assured, on the 16th April, 1895, indorsed on the said certificate a revocation as to the payment of the fund, and directed such payment to be made "to my children as directed by my will."

Simon Snyder died on the 22nd March, 1902, having on the previous day made his last will, probate of which was granted to the executors above named out of the surrogate court of the county of Waterloo.

By the terms of the will the executors are to sell and convert all the estate into money as soon as they may find it profitable so to do. They are required to provide a suitable residence for the testator's widow, and she is granted an annuity during life of $250; and, subject to such annual payment, the 7th paragraph of the will (which is the only clause of the will necessary to be considered) provides that: "My executors shall divide all the rest and residue of my estate between my children, share and share alike, payable as follows:—One-quarter of the share of each child to be paid to him or her respectively when he or she attains the age of 21 years; another quarter of the share of each child to be paid to him or her respectively when he or she attains the age of 25 years; another quarter of the share of each child when he or she attains the age of 30 years; and the balance of the share of each child when he or she attains the age of 35 years."

The testator left six children him surviving: Herbert M. Snyder, now 39 years old; Alfred H., aged 36; Minnie Emma, 34 years old; Alberta Lucina Snyder, born on the 30th June, 1881, who has just reached her majority; and Florence Maude Snyder and Clayton Henry Snyder, who are both infants.

The Insurance Act, R.S.O. 1897, ch. 203, sec. 151, sub-sec. (6), as amended by 1 Edw. VII. ch. 21, sec. 2, sub-sec. (7), reads: "If one or more of the beneficiaries die in the lifetime of the assured and no apportionment or other disposition is

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subsequently made by the assured, the insurance shall be for the benefit of the surviving beneficiary or beneficiaries in equal shares if more than one; and if all the beneficiaries die in the lifetime of the assured, the insurance shall be for the benefit in equal shares of the surviving infant children of the assured, and if no surviving infant children, then the benefit of the contract and the insurance money shall form part of the estate of the assured."

The assured could, therefore, on the death of his wife—the sole beneficiary of the preferred class—under sub-sec. (3) of sec. 151, "by instrument in writing attached to or by indorsement on, or identifying the said contract by number or otherwise . . substitute new beneficiaries," who must be of the preferred class, which class includes children, grandchildren, and mother of the assured: sec. 159, sub-sec. (2).

Now, the assured, seven years after making the indorsement, already referred to, on the beneficiary certificate, made his will, by which he directed that the whole of his estate should be divided amongst his children—there being both adult and infant children—in equal shares.

Had the assured simply indorsed the certificate making the insurance payable to his children, without any reference to his will, the beneficiaries would have been sufficiently designated, as all the children living at the time of his death would have been entitled to share equally in the fund: *Mearns* v. *Ancient Order of United Workmen* (1892), 22 O.R. 34. But the indorsement on the benefit certificate did not effect a complete substitution of new beneficiaries, as the children who were by the terms of the indorsement to receive payment of the fund were such as he should direct by his will. The will—the instrument in writing by which under the Act the beneficiary may be designated or ascertained—makes no reference whatever to the benefit certificate (the contract), nor is it attempted to be identified by number or otherwise in the will, as required by sec. 151, sub-sec. (3), so as to create under the statute a substitution of new beneficiaries.

The assured, when he indorsed the beneficiary certificate, may have intended that his infant children should be the new beneficiaries under his will. But, as the amendment to sec.

151, sub-sec. (6), by 1 Edw. VII. ch. 21, sec. 2, sub-sec. (7), by which, in the event of new beneficiaries not being appointed as provided by the Act, the insurance fund would be payable to his infant children, was passed a year prior to the making of the will, he may have considered it unnecessary to deal with the benefit certificate by his will, leaving the infant children to take the fund under the Act.

Were the applicants—the executors—to succeed on this motion, the result would be that the estate of the assured would get the benefit of this insurance fund, and, as a consequence, the creditors of the assured (if there were any) might be paid out of it. It was in order to prevent this that the Act provides that where the beneficiary is of the preferred class, the assured shall not divert the benefit "to a person not of the said class or to the assured himself or to his estate:" sec. 151, sub-sec. (3.)

The motion fails, and it is declared that Alberta Lucina Snyder, Florence Maude Snyder, and Clayton Henry Snyder, who were at the time of the death of Simon Snyder his infant children, are entitled to the fund created by said benefit certificate and paid into Court, in equal shares, less the sum of $15 to be transferred to the account of the official guardian for his fees on this motion. And Alberta Lucina Snyder having since the death of her father attained the age of 21 years, it is ordered that her share, together with the accrued interest thereon, be paid out of Court to her; and that the shares of the other infants be paid to them on their respectively reaching the age of 21 years.

The costs of the executors to be paid out of the testator's estate as between solicitor and client.

E. B. B.

[MACMAHON, J.]

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July 17.

MORROW v. PETERBOROUGH WATER CO. ET AL.

Company — Winding-up — Distribution of Surplus — Shareholders — By-laws — Resolutions.

A municipal water company, incorporated under the Ontario Joint Stock Companies Act, sold their undertaking and franchise to the municipality, and passed a resolution providing for payment at par value to the shareholders of the stock allotted to them in proportion to the amounts paid on their respective shares and for payment of the liabilities and the costs of winding-up, etc., and directing that the surplus should be distributed amongst the members according to their rights and interests in the company.

By by-law of the company, holders of second preference shares were to be paid dividends at 6 per cent., and for a period of five years were not to participate further in the profits of the company. In case of default in payment of any dividend, the deficiency was to be paid out of the net profits of succeeding years, and no dividend was to be paid on the ordinary stock until such deficiency should be fully paid. Second preference shareholders also had the right, under the by-law, upon foregoing their secured dividend of 6 per cent., to surrender their shares and receive the par value thereof, or a corresponding number of ordinary shares, in which case they would have the same rights and privileges as the ordinary shareholders; but none of them exercised this option. The by-law also provided that, in the event of the company being wound up, if any surplus of the capital assets of the company was to be returned to shareholders, the holders of second preference shares were to be paid the full amount of their shares and all dividends before the return of the capital of any ordinary shares, "and, subject thereto and to the first preference stock, the holders of the ordinary shares shall be entitled to such surplus of the capital assets:"—

Held, that the second preference shareholders were not entitled to share in the surplus assets.

Held, also, that the surplus was divisible among the ordinary shareholders in proportion to the amount of their shares, not to the amounts paid on their shares.

Birch v. *Cropper*, *In re Bridgewater Navigation Co.* (1889), 14 App. Cas. 525, followed.

SPECIAL CASE. The facts and arguments are stated in the judgment.

The case was heard by MACMAHON, J., in the Weekly Court, on the 24th June, 1902.

G. F. Shepley, K.C., for the plaintiff.

R. E. Wood, for the defendants Rogers and Lewis.

L. M. Hayes, for the defendant Collins.

C. H. Bradburn, for the defendants the Peterborough Water Company.

July 17. MACMAHON, J.:—The action is by the plaintiff, Morrow, who sues on behalf of himself and all other holders of

partly paid shares of the stock of the defendant company, to recover his distributive share of certain moneys now in the hands of the said company. The defendants Rogers and Lewis were, by order of the Court, added parties defendant and authorized to defend on behalf of all holders of fully paid shares of the ordinary stock of the company. The defendant Collins was also by order added as a party defendant and authorized to defend on behalf of all holders of the second preference stock of the said company.

The parties have agreed on the facts hereinafter set forth, and stated the following case for the opinion of the Court:—

2. The defendants the Peterborough Water Company, Limited, were incorporated in the year 1881 by registration in accordance with R.S.O. 1877, ch. 157, being an Act respecting Joint Stock Companies, for supplying cities, towns, and villages with gas and water.

3. The head office of the said company is at the town of Peterborough in the county of Peterborough.

4. The object for which the said company was formed was to supply the town of Peterborough with water.

5. The nominal capital stock of the company was $200,000 divided into 10,000 shares of the par value of $20 each.

6. The working capital of the company was made up as follows:

(a) 1000 shares first preference 5 per cent. stock subscribed and fully paid.

(b) 1,250 shares second preference stock subscribed and fully paid.

(c) 1,452 shares common stock subscribed and fully paid up.

25 shares common stock subscribed on which has been paid 60 per cent. of the par value thereof.

3,444 shares common stock subscribed on which has been paid 55 per cent. of the par value thereof.

175 shares common stock subscribed on which has been paid 35 per cent. of the par value thereof.

The plaintiff was the owner of 117 shares of the common stock of the said company, on which he had paid 55 per cent. of the par value thereof.

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7. The first preference shares of the stock of the said company were issued pursuant to by-law No. 26 of the said company, and were wholly subscribed for by the directors of the said company in trust for said company, and no claim is made in respect thereof to share in the moneys hereinafter mentioned.

8. On or about the 31st day of January, 1902, all the property, real and personal, together with the undertakings, franchises, rights, easements, and privileges of the said defendant company, were sold to the corporation of the town of Peterborough for the sum of $230,000, under the provisions of the Municipal Waterworks Act, and thereupon it became impossible for the company to longer continue its business.

9. The second preference stock of the said company was created and issued pursuant to by-law No. 27 of the Peterborough Water Company, passed the 16th day of April, 1895. In said by-law No. 27 it is provided that such second preferred stock shall be subject only to the first preference stock issued and subscribed under by-law No. 26, and shall have preference and priority over all other stock of the company theretofore created or issued or which should be thereafter created or issued, in the respects following:

(a) Dividends on such preference stock at the rate of 6 per cent. per annum, to be computed from the date such stock should be subscribed for and allotted, were to be paid out of the net profits of the company before any dividends on ordinary stock, half-yearly on the 15th days of October and April in each year; and for a period not to exceed 5 years from the 15th April, 1895, the holders thereof should not be entitled to participate further in the profits of the company; in case of default of any such payment then the deficiency should be paid out of the net profits of succeeding years, and no dividend should be declared or paid on the ordinary capital stock of the company until such deficiency should be fully paid.

(b) On the 15th April, 1900, or any subsequent year, the holders of such preference stock should be entitled to surrender the same and receive in lieu thereof the par value thereof in lawful money of Canada, or at their option to surrender the same and receive in lieu the corresponding amount of shares of

the ordinary capital stock of the company, and thereupon should thenceforward enjoy the same and no greater rights or privileges than the holders of ordinary shares theretofore created or issued. No surrender had ever been made by any of the holders of such second preference stock, and the owners thereof continued to hold the same in the same plight and condition as when originally issued to them.

10. In said by-law No. 27 it was further provided that, in the event of the company being wound up, if any surplus of the capital assets of the company was to be returned to shareholders, the holders of the second preference stock to be issued in pursuance of this by-law should be entitled to have the full nominal amount of their said shares and all dividends thereof up to that date returned and paid to them before any return of the capital was made in respect of any shares of the ordinary capital stock of the company, and, subject thereto and to the first preference stock, the holders of the ordinary shares should be entitled to such surplus of the capital assets.

11. The full nominal amount of the first preference stock and all dividends thereof up to the 31st day of January, 1902, were duly tendered the holders of the said first preference stock and were accepted by them, and such amount and such dividends have been returned and paid to the holders of such stock.

12. The full nominal amount of the second preference stock and all dividends thereof up to the 31st day of January were duly tendered the holders of such second preference stock and were accepted by them, and such amount and such dividends have been returned and paid to the holders of such stock.

On the 31st day of December, A.D. 1901, the said company made and declared their statement of profit and loss account, which is fully set out in the special case. From the account there remained only $2,075.13 cash on hand.

16. The amounts respectively paid in by the holders of shares of the ordinary capital stock of the company have been returned and paid to them, together with interest on such amounts paid in to the 31st day of January, 1902.

17. After having provided for the satisfaction of all the liabilities of the said defendant company, the return of all

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share capital, and the payment of dividends as above set forth, there remains a considerable surplus in the bank to the credit of the company, as more fully appears by the statement in the special case.

The surplus in the bank, as appears by the statement above referred to, is the sum of $19,039.24.

The question for the opinion of the Court is: In what proportion or proportions are the said moneys in the hands of the company distributable among the shareholders of the stock of the said company other than the holders of the said first preference shares?

The majority of the shareholders of the company were empowered by the Act under which it was incorporated, R.S.O. 1877, ch. 157, sec. 9, "to make such by-laws as they deem proper for the following (amongst other) purposes:"—

(1) For the management and disposition of the stock, business, and affairs of the company.

By-law No. 27, under which the second preference stock was issued, forms the contract between the company and such stockholders. The by-law secures dividends to them at 6 per cent., and for a period of 5 years they are not to participate further in the profits of the company. In case of default in payment of any dividend, the deficiency is to be paid out of the net profits of succeeding years, and no dividend is to be paid on the ordinary stock until such deficiency is fully paid.

The holders of this preferred stock under the part of the by-law set out in cl. 9 (b) of the special case, after the 15th April, 1900 (had they been willing to forego their rights to the secured dividend of 6 per cent.), could have surrendered their preference stock and been paid the par value thereof or received the corresponding amount of shares of the ordinary stock, and they would then have had the same rights and privileges as the other holders of ordinary stock. None of the shareholders of this preferred stock had up to the time of the winding-up surrendered their shares under the option thus given.

Then the part of the by-law set out in cl. 10 of the case provides that, in the event of the company being wound up, if any surplus of the capital assets of the company was to be

returned to shareholders, the holders of the second preference stock to be issued under and in pursuance of the by-law are to be paid the full amount of their shares and all dividends before the return of the capital of any shares of the ordinary stock of the company, "and, subject thereto and to the first preference stock, the holders of the ordinary shares shall be entitled to such surplus of the capital assets."

No language could more clearly provide for exclusion of the second preference stockholders from participating in the surplus assets than that employed in the concluding words of cl. 10. Had the second preference stockholders not thus been contracted out of participation in the surplus assets, they might, on the authority of *Birch* v. *Cropper*, *In re Bridgewater Navigation Co.* (1889), 14 App. Cas. 525, have been entitled to share therein with the holders of ordinary shares. For in that case the holders of preference stock were held entitled to share with the holders of ordinary stock, because, as pointed out by Lord Macnaghten, at p. 546, "there was no bargain—no provision of any sort—affecting their rights as shareholders in the capital of the company." In the *Birch* case the original capital consisted of ordinary shares, partly paid up. Afterwards preference shares were issued entitling the holders to a dividend at a fixed rate with priority over all dividends and claims of the ordinary shareholders. The preference shares were fully paid up. The articles contained no provisions as to the distribution of assets on the winding-up of the company. The undertaking was sold under an Act which made no provision for the distribution of the purchase money among the shareholders. There was a voluntary winding-up, and the House of Lords held that, after payment of all debts and repaying to the ordinary and preference shareholders the capital paid on their shares, the assets ought to be divided among all the shareholders, not in proportion to the amount paid on their shares, but in proportion to the shares held.

As I have indicated, the second preference shareholders are not entitled to share in the surplus assets.

The remaining question to be decided is: How are the surplus assets to be distributed amongst the shareholders of the ordinary stock? Some of such shareholders had fully paid

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up their shares; others had paid 60 per cent., some 55 per cent. and some only 35 per cent., on their shares. And it was urged by counsel for the shareholders of fully paid up stock that the surplus assets should be distributed amongst the members in proportion to the capital paid on the shares held by them. In some cases the articles of association of a company make provision that on the winding-up of the company the surplus assets shall be divided among the members in proportion to the capital paid as was done in *In re Anglo-Continental Corporation of Western Australia*, [1898] 1 Ch. 327, and *In re Mutoscope and Biograph Syndicate*, [1899] 1 Ch. 896, and when that is the case the principle of distribution thus provided for must be carried out.

The only provision made by the Peterborough Water Company for the distribution of the assets is a resolution passed at a general meeting of the shareholders of the company on the 2nd March, 1902, which, after providing for payment at par value to the shareholders of the stock allotted to them in proportion to the amounts paid on their respective shares and dividends thereon to 31st January, 1902, and for payment of the liabilities and the costs of winding-up, etc., directs that "the surplus at the credit of the company's account in the bank be distributed amongst the members according to their rights and interests in the company."

This resolution was, no doubt, framed from the English Companies Act, 1862, which provides (sec. 133): "The following consequences shall ensue upon the voluntary winding-up of a company: (1) The property of the company shall be applied in satisfaction of its liabilities *pari passu*, and, subject thereto, shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company."

Where, therefore, the articles of association or regulations (resolutions) of a company do not provide for the distribution of the assets on the winding-up of a company, then, as stated by Mr. Buckley in his work on Companies, 8th ed., p. 337, "If the surplus assets are sufficient to repay every member his capital in full and still to leave a surplus, such surplus, except so far as it consists of undivided profit, forms part of the joint

stock which at the winding-up represented the capital, and in the absence of provision to the contrary, is divisible amongst all the members in proportion to their interests in capital, that is, in proportion to the amount of their shares, not to the amounts paid on their shares." The author refers to *Birch* v. *Cropper, In re Bridgewater Navigation Co.*, 14 App. Cas. 525, and the above summing up of the law is extracted from the judgments delivered in that case. As already pointed out, the original capital of the Bridgewater Navigation Company consisted of ordinary shares partly paid up. Afterwards preference shares were issued which were fully paid up and entitled the holder to a dividend at a fixed rate, with priority over all dividends and claims of the ordinary stockholders. And Lord Herschell in his judgment, at pp. 533-4, answering the contention of counsel for the preference shareholders that the surplus assets should be distributed amongst the shareholders in proportion to the amount paid on their shares, said: "In my opinion one consideration of essential importance, if an equitable distribution of the assets is to be attained, has been altogether lost sight of. The payment of £3 10s. per share was not the only contribution made by the ordinary shareholders to the assets of the company. They had each come under liability to pay the balance due on the shares held by them. Such a contribution might in many cases be just as valuable and tend just as effectually to the prosperity of the company as if they had actually paid the amount. I cannot think that this ought to be disregarded in estimating the respective rights and interests of members in the company and its property." And at p. 538: "The truth is that each member who has subscribed for a £10 share owns the same share in the company whether it be or be not paid up, and if he is so regarded for the purpose of meeting losses, I cannot see that it is equitable that he should be otherwise dealt with when we are considering to what share of the profit he is entitled. When the whole of the capital has been returned both classes of shareholders are on the same footing, equally members and holding equal shares in the company, and it appears to me that they ought to be treated as equally entitled to its property."

Lord Macnaghten, dealing with the same point, said (p. 546): "Then the preference shareholders say to the ordinary share-

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holders, 'We have paid up the whole of the amount due on our shares; you have paid but a fraction on yours. The prosperity of the company results from its paid up capital; distribution must be in proportion to contribution. The surplus must be divided in proportion to the amounts paid up on the shares.' That seems to me to be ignoring altogether the elementary principles applicable to joint stock companies of this description. . . They" (the surplus assets) "are part and parcel of the property of the company—part and parcel of the joint stock or common fund—which at the date of the winding-up represented the capital of the company. It is through their shares in the capital, and through their shares alone, that members of a company limited by shares become entitled to participate in the property of the company."

I have just a word to say respecting the sum of $5,279.64, which appeared as the net amount carried forward on the 31st December, 1901. Mr. Wood contended that this sum, being the profits for the year, should have been distributed as dividends amongst the stockholders, and formed no part of, and should not be included as part of, the surplus assets for distribution under the winding-up. The admission in the special case (para. 13) is, that on the 31st December, 1901, there remained only $2,075.13 on hand, and this sum is, I find, included as part of the receipts in a statement of receipts and payments of the Peterborough Water Company from the 1st January to the 16th June, 1902. That and other receipts of the company were expended between the above dates in payment of liabilities of the company.

All the stockholders, both second preference and the holders of ordinary shares of stock, having had returned to them the amount paid in by them on their shares, together with the dividends payable thereon up to the period of distribution, and all the debts and liabilities having been paid, I direct that, after payment out of the surplus assets on hand of the costs of all parties of this motion, the remaining assets of the company be distributed among all the shareholders of the ordinary stock of the company in proportion to their shares.

E. B. B.

[IN CHAMBERS.]

RE THOMSON V. STONE ET AL.

1902

July 15.

County Courts—Jurisdiction—Equitable Relief—Amount in Controversy—Judgment Creditor—Setting aside Chattel Mortgage—Prohibition.

Where the plaintiff, having recovered judgment for $92.05 and costs against the defendant in a division court, brought an action in a county court to set aside as fraudulent as against him a chattel mortgage for $520 made by the defendant :—

Held, on motion for prohibition, that the subject-matter involved was the amount due on the judgment—it not being alleged or proved that there were any other debts of the defendant than that due to the plaintiff; and the county court had jurisdiction by virtue of sec. 22 (13) of R.S.O. 1897, ch. 55.

Forrest v. *Laycock* (1871), 18 Gr. 611, followed.

Dominion Bank v. *Heffernan* (1886), 11 P.R. 504, and *Re Lyons* (1884), 10 P.R. 150, distinguished.

THIS was a motion by the defendants for an order prohibiting, after judgment, further proceedings in this action in the county court of the county of York, on the ground that the subject-matter involved in the action was not within the jurisdistion of that Court. The facts are stated in the judgment.

The motion was heard by MEREDITH, C.J.C.P., in Chambers, on the 11th April, 1902.

John MacGregor, for the defendants.

B. E. Swayzie, for the plaintiff.

July 15. MEREDITH, C.J. :—The action was brought by the respondent, who had recovered a judgment for $92.05 and costs against the applicant Charles E. Stone in the 1st division court in the county of York, to set aside as fraudulent against him (the respondent) a chattel mortgage for $520 made by the applicant Charles E. Stone to his wife, who is the other defendant in the action, on certain goods and chattels of the husband.

It was contended by Mr. MacGregor that, the mortgage sought to be set aside being for a greater sum than $200, and the value of the goods and chattels conveyed by it being, as he

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contended was shewn, greater than $200, the county court had no jurisdiction to try the action.*

In *Forrest* v. *Laycock* (1871), 18 Gr. 611, it was held that the subject-matter involved in an action such as this "must be taken to be the amount due on the judgment in respect of which equitable relief is sought." In that case, as in this, the action was to obtain payment of the plaintiff's debt only, and it was not alleged or proved that there were any other debts of the grantor.

In *Dominion Bank* v. *Heffernan* (1886), 11 P.R. 504, my brother Ferguson said that, since the Creditors' Relief Act came into force, the principle of *Forrest* v. *Laycock* did not strictly apply; but in the case he was dealing with there were other executions against the debtor in the hands of the sheriff, and what I understand my learned brother to have decided was, that—the effect of the Creditors' Relief Act being to entitle the other execution creditors to share *pro ratâ* with the plaintiff in the proceeds realized from the property in question—the amount of all the executions must be included in ascertaining the subject-matter involved in the action.

In the present case there were no executions in the bailiff's hands but that of the respondent, and *Dominion Bank* v. *Heffernan* is, therefore, not an authority for the contention of the applicants, and *Forrest* v. *Laycock* was not applied because, and only because, there were the claims of other execution creditors, which, added to the claim of the plaintiffs, made a sum in excess of $200.

Re Lyons (1884), 10 P.R. 150, would appear to be distinguishable; the reason for the decision of the Chancellor, in so far as it affects the question under consideration in this case, being that what was in contest there was the whole amount represented by the second mortgage, which was more than $400; but, however that may be, I should, I think, follow *Forrest* v. *Laycock*, which is, as I have said, a direct decision upon the very point now before me, and following it I must dismiss the motion with costs.

*By sec. 22, cl. 13, of the County Courts Act, R.S.O. 1897, ch. 55, the county courts shall have jurisdiction "in actions by any person seeking equitable relief in respect of any matter whatsoever, where the subject-matter involved does not exceed $200."

E. B. B.

[DIVISIONAL COURT.]

STACK v. T. EATON CO. ET AL.

D. C.
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Fixtures—Vendor and Purchaser—Shop Fittings—Gas and Electric Light Fittings.

Shop fittings, consisting of shelving made in sections, each section being screwed to a bracket affixed to the wall of a building, the whole being readily removable without damage either to the fittings or the building, and gas and electric light fittings, consisting of chandeliers which were fastened by being screwed or attached in the ordinary way to the pipes or wires by which the gas and electric currents were respectively conveyed, and were removable by being unscrewed or detached without doing damage either to the chandeliers or the building, were placed in it by the owner of the freehold land on which it stood:—

Held, that these articles became part of the land and passed by a conveyance of it to the defendants.

Bain v. *Brand* (1876), 1 App. Cas. 762, *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328, *Hobson* v. *Gorringe*, [1897] 1 Ch. 182, *Haggert* v. *Town of Brampton* (1897), 28 S.C.R. 174, and *Argles* v. *McMath* (1895), 26 O.R. 224, 248, followed.

Judgment of MACMAHON, J., affirmed.

THIS action was brought by Michael Stack against the T. Eaton Company, Limited, and Betsy Levy, carrying on business as "Bachrack & Co.," to obtain delivery up to the plaintiff of certain fixtures or chattels, and damages for the unlawful detention thereof, or to recover the value of such fixtures.

Prior to October, 1897, W. J. Guinane and John Guinane carried on business in partnership as boot and shoe merchants at No. 214 Yonge street, in the city of Toronto, and were the owners of the store and premises known as 214 Yonge street, and had on the premises certain shop fittings and gas and electric light fittings used in connection with their business. Prior to October, 1897, the partnership between W. J. Guinane and John Guinane was dissolved by the Court, and the assets of the firm were handed over to E. R. C. Clarkson, who was appointed receiver and manager of the business, with power to make leases of the premises. On the 26th October, 1897, Clarkson leased the premises to the defendant Levy, and also leased to her all the shelving, gas fixtures, electric and other fixtures, awnings, etc., which were upon the premises, and which were the property of the Guinanes, and she was in possession of the premises and of the fixtures or chattels at the

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commencement of this action. Subsequent to the 26th October, 1898, W. J. Guinane sold and conveyed his interest in the lands to James J. Guinane, who with John Guinane continued to be the owner of the store and premises. In January, 1900, James J. Guinane and John Guinane sold and conveyed the premises to one Charles Smith, who subsequently conveyed to the defendant company.

The plaintiff alleged that he was the owner of the fixtures or chattels by virtue of assignments or transfers from the Guinanes to one Laxton and from Laxton to himself; that the defendant Levy refused to deliver them up; and that the conveyance of the land by the Guinanes to Smith did not operate as a sale or transfer of such fixtures or chattels.

The defendant company alleged that they purchased the store and premises with the fixtures therein at the time of such purchase and that the fixtures passed to the defendant company as part of the freehold by the deed of conveyance.

The action was tried on the 13th September, 1901, at Toronto, without a jury, by MACMAHON, J., who on the 18th November, 1901, gave judgment for the plaintiff for $40, the value of a small part of the fixtures, with division court costs, and for defendants in respect of the remainder, with High Court costs.

The plaintiff appealed from the judgment so far as it was in favour of the defendants, and his appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., and LOUNT, J., on the 10th June, 1902.

W. R. Smyth, for the plaintiff, contended that the articles in question were chattels, and did not pass by the conveyance of the freehold.

G. F. Shepley, K.C., for the defendants, *contra*.

In addition to the cases mentioned in the judgment the following were referred to on the argument:—*Sewell* v. *Angerstein* (1868), 18 L.T.N.S. 300; *Beck* v. *Rebow* (1706), 1 P. Wms. 94; *Colegrave* v. *Dias Santos* (1823), 2 B. & C. 76; *Rogers* v. *Ontario Bank* (1891), 21 O.R. 416; *Minhinnick* v. *Jolly* (1898-9), 29 O.R. 238, 26 A.R. 42; *Canada Permanent L. &*

S. Co. v. *Traders Bank* (1898), 29 O.R. 479; *McCosh* v. *Barton* (1901), 1 O.L.R. 229; *Monti* v. *Barnes*, [1901] 1 K.B. 205.*

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July 18. MEREDITH, C.J.:—This is an appeal by the plaintiff from the judgment of MacMahon, J., after the trial of the action before him without a jury at Toronto on the 13th September, 1901, in so far as he dismissed the action.

The controversy is as to the ownership of certain shop and gas and electric light fittings, which were placed by one Guinane in a building on freehold land then owned by him, and which the respondents, who are subsequent purchasers of the land, claim as having passed to them as part of the realty by the conveyance of the land to them.

The shop fittings consisted of shelving made in sections, each section being screwed to a bracket affixed to the wall of the building—the whole being readily removable without damage either to the fittings or the building.

The gas and electric light fittings consisted of chandeliers which were fastened by being screwed or attached in the ordinary way to the pipes or wires by which the gas and electric currents were respectively conveyed, and were remov-

*Counsel for the plaintiff also referred, in a written memorandum submitted to the Court after the argument, to the following English cases:—*Ex p. Quincy* (1750), 1 Atk. 477; *Rex* v. *Hedges* (1779), 1 Leach C.C. 201; *Davis* v. *Jones* (1818), 2 B. & Ald. 165; *Rex* v. *Inhabitants of Otley* (1830), 1 B. & Ad. 161; *Trappes* v. *Harter* (1833), 2 C. & M. 153, 180; *Birch* v. *Dawson* (1834), 4 N. &. M. 22, 6 C. & P. 658; *Ex p. Wilson* (1835), 2 M. & Ayr. 61; *Lane* v. *Dixon* (1847), 3 C.B. 776; *Wilde* v. *Waters* (1855), 16 C.B. 637; *Elliott* v. *Bishop* (1855), 24 L.J. Ex. 33, 39, 42, 229; *Hutchinson* v. *Kay* (1857), 23 Beav. 413; *Ex p. Acton* (1861), 4 L.T.N.S. 261; *Parsons* v. *Hind* (1866), 14 W.R. 860; *Boyd* v. *Shorrock* (1867), L.R. 5 Eq. 72; *Climie* v. *Wood* (1869), L.R. 4 Ex. 328; *Ex p. Astbury* (1869), L.R. 4 Ch. 630; *Longbottom* v. *Berry* (1869), L.R. 5 Q.B. 123; *Turner* v. *Cameron* (1870), *ib.* 306; *Lee* v. *Gaskell* (1876), 1 Q.B.D. 700; *Hill* v. *Bullock*, [1897] 2 Ch. 482: and to the following Ontario cases:—*Patterson* v. *Johnson* (1864), 10 Gr. 583; *Keefer* v. *Merrill* (1881), 6 A.R. 121, 125, 132, 144; *McCausland* v. *McCallum* (1882), 3 O.R. 305: and to the following American cases:—*Hays* v. *Doane* (1855), 11 N.J. Eq. 84; *Vaughen* v. *Haldeman* (1859), 33 Pa. St. 522; *Shaw* v. *Lenke* (1865), 1 Daly 487; *Capen* v. *Peckham* (1868), 35 Conn. 88; *Weston* v. *Weston* (1869), 102 Mass. 514; *Guthrie* v. *Jones* (1871), 108 Mass. 191; *Towne* v. *Fiske* (1879), 127 Mass. 125; *McKeage* v. *Hanover Fire Ins. Co.* (1880), 81 N.Y. 38; *Manning* v. *Ogden* (1893), 70 Hun 399; *Capehart* v. *Foster* (1895), 61 Minn. 132; *Griffen* v. *Jansen* (1897), 39 S.W. Repr. 43.

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able by being unscrewed or detached without doing damage either to the chandeliers or the building.

It is, I think, impossible, having regard to the authorities, to give effect to the contention of Mr. Smyth that these articles were chattels and did not pass to the purchasers of the land by the conveyance of it to them.

It is unnecessary to go through the long list of cases cited on the argument or to resort to American authorities, for, in my opinion, the law as to both classes of the articles in question is settled by authority binding upon us, and all that remained for my brother MacMahon to do, or that we have to do, is to apply the principle of the cases to the facts which were brought out in evidence at the trial.

I take it to be settled law:—

(1) That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as shew that they were intended to be part of the land.

(2) That articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue chattels.

(3) That the circumstances necessary to be shewn to alter the *primâ facie* character of the articles are circumstances which shew the degree of annexation and object of such annexation, which are patent to all to see.

(4) That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation.

(5) That, even in the case of tenants' fixtures put in for the purposes of trade, they form part of the freehold, with the right, however, to the tenant, as between him and his landlord, to bring them back to the state of chattels again by severing them from the soil, and that they pass by a conveyance of the land as part of it, subject to this right of the tenant.

These propositions are the result of the decisions in *Bain* v. *Brand* (1876), 1 App. Cas. 762, 772, *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328, and *Hobson* v. *Gorringe*, [1897] 1 Ch. 182, and are in accordance with the view of the Supreme Court of Canada in *Haggert* v. *Town of Brampton* (1897), 28 S.C.R.

174, which was decided in the same month as *Hobson* v. *Gorringe*, though a few days before the judgment in that case was delivered.

Referring to the use in one of the cases of the words "merely for a temporary purpose," as applied to the object of affixing an article to the soil, Lord Blackburn in *Holland* v. *Hodgson* (p. 337) points out the obvious distinction between the case of a carpet tacked to the floor (an illustration used by Mr. Smyth more than once in his argument) and the affixing by a tenant of a shop counter for the purpose, "in one sense," he says, "temporary," of more effectually enjoying the shop, whilst he continues to sell his wares there.

If a shop counter affixed by a tenant becomes, as Lord Blackburn was of opinion that it did, a part of the freehold, subject to the right of the tenant to bring it back to its state of a chattel again by severing it, I am unable to see why the shelving affixed by Guinane, when he was the owner of the freehold, for the purpose of the business he carried on there, is not to be deemed a part of the land; and I can see nothing in the degree or object of the annexation of it to lead to the conclusion that such an intention existed as is necessary to alter the *primâ facie* character of the article arising from the fact of its being affixed, but the contrary.

The title to the gas and electric light fittings is, as it seems to me, to be determined by the same considerations, which lead necessarily, I think, to the conclusion that, when affixed as they were, they became part of the land and passed by the conveyance of it to the respondents.

That it has been judicially determined that by the law of England they are fixtures, was the view expressed by the present Chief Justice of Ontario in delivering the judgment of a Divisional Court in *Argles* v. *McMath* (1895), 26 O.R. 224, at p. 248, and I see no reason for differing from that conclusion.

The appeal, in my opinion, fails, and should be dismissed with costs.

LOUNT, J.:—I agree.

T. T. R.

[IN THE COURT OF APPEAL.]

C. A.
1902
June 28.

COUNSELL v. LIVINGSTON.

Bills of Exchange—Notice of Dishonour—Husband Wife's Agent—Knowledge of Husband—Form of Notice.

Notice is merely knowledge, and notice to an indorser who is also agent for another indorser, at once becomes in law the knowledge of the principal with all its consequences.

In an action against husband and wife, indorsers on a promissory note, given as one of a series of renewals during some years under an agreement of which the husband had knowledge, in which the notice of dishonour given was a letter in the words: "I beg to advise you that Mr. ——'s note for $3,500 in your favour and indorsed by yourself and wife and held by our estate was due yesterday. As I have not received renewal, will you kindly see that the same is forwarded with cheque for discount, as there is no surplus on hand," addressed and sent to the husband only:—

Held, on the evidence that the husband was agent for the wife, and that such letter was sufficient notice of dishonour to both.

Paul v. *Joel* (1858), 3 H. & N. 455, followed.

Judgment of Falconbridge, C.J.K.B., affirmed.

THIS was an appeal by the defendants W. C. Livingston and C. E. Livingston from the judgment of Falconbridge, C.J.K.B., reported 2 O.L.R. 582, and was argued on the 18th April, 1902, before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS and GARROW, JJ.A.

Aylesworth, K.C., for the appeal. The letter (set out in the judgment) is not a sufficient notice of dishonour. It did not identify the note or indicate that it was not paid or shew its date or state the time it had to run or allege presentment: Bills of Exchange Act, 1890, 53 Vict. ch. 33, sec. 49 (D.). A note is not necessarily dishonoured because overdue. Then, in addition, as to the defendant, C. E. Livingston, the wife: no notice was sent to her at all. The letter sent to the husband was not addressed to her, nor was there any request to communicate its receipt or contents to her. It is true notice may be given to an agent, but only to such an agent as is *specially* authorized in that behalf. Here it should have been given to both appellants as no such authority was proved: Bills of Exchange Act, 1890, sec. 49 (D.). The appellants rely on *Solarte* v. *Palmer* (1834), 1 Bing. N.C. 194, and *Furze* v. *Sharwood* (1841), 2 Q.B. 388, referred to in the trial judgment of the Chief Justice.

Martin, K.C., contra. The agreement under which it was given identifies the note to the knowledge of the husband. He knew what note the letter referred to, so the notice to him was sufficient. The letter also shews on its face, that it was intended for the wife as well. The evidence shews that the husband acted for the wife all through the transaction of the business, arising out of the agreement under which the note was given; and the trial Judge has found on the evidence, that he was her agent. Payment by renewal was demanded, and the notice was far more specific than that in *The Queen* v. *The Bank of Montreal* (1886), 1 Ex. C.R. 155 at p. 171. See also *Honsego* v. *Cowne* (1837), 2 M. & W. 348.

Aylesworth, in reply. The letter was no notice of presentment and non-payment, but a mere request for the usual renewal.

June 28. The judgment of the Court was delivered by GARROW, J.A.:—Two questions are involved in this appeal:

1. That the notice of dishonour was insufficient; and

2. That the defendant, W. Churchill Livingston, was not the agent of his wife, the defendant, Charlotte E. Livingston, to receive the notice.

I think the appeal fails on both grounds.

The notice was in the words following: "I beg to advise you that Mr. T. C. Livingston's note for $3,500 in your favour and indorsed by yourself and wife and held by our estate was due yesterday. As I have not received renewal, will you kindly see that same is forwarded with cheque for discount, as there is no surplus on hand."

The note in question is dated 17th December, 1900, at three months, payable at the Bank of Montreal at the city of Hamilton, and is one of a series of renewals originating under an agreement concerning property in Winnipeg, dated 27th October, 1897, between the late Charles Matthew Counsell and the defendant, Thomas C. Livingston, the father of the defendant, W. Churchill Livingston, which provides among other things that Counsell will "discount the note of the said T. C. Livingston payable at the Bank of Montreal in Hamilton, indorsed by W. C. Livingston, of Brantford, and by the said Charlotte

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E. Livingston, for the sum of $3,500, payable three months from date thereof, the discount thereon to be at the rate of eight per cent. per annum, and to discount at the said rate of eight per cent. per annum any renewal or renewals thereof, bearing all the said names for like periods of three months from time to time; but so that the last of such renewals shall not fall due later than four years from the date hereof: provided such renewals are presented from time to time on, or prior to, or within five days after the maturity of the note then current, and the discount at the rate aforesaid is paid in advance on each of said renewals." So that, apparently every three months the original note had been renewed by these defendants, through a period of about three years until the making of the last note, the one in question.

The defendant, T. C. Livingston, resided at the city of Hamilton, and his son, the defendant, W. Churchill Livingston, and his wife resided at the city of Brantford.

The renewals were apparently attended to, from time to time, by either T. C. Livingston or W. Churchill Livingston, who was aware of the agreement, which his father had made with the late Mr. Counsell, and the defendant, Charlotte E. Livingston simply indorsed as she was directed by either her father-in-law or her husband, sometimes the one, and sometimes the other, but usually the husband, as I gather from the evidence. The notice of dishonour, before set out, was only sent to the defendant, W. Churchill Livingston; no copy was mailed to the defendant, Charlotte E. Livingston, nor to the defendant, W. Churchill Livingston, for her.

Dealing first with the question of agency, I think the evidence amply sufficient to sustain the finding of the learned Chief Justice of the King's Bench Division, who tried the action without a jury: that the husband was the wife's agent to receive the notice in question.

The husband on his examination, says:—Q. You were cognizant of it all, and she was cognizant you were looking after it? A. I suppose so. Q. She depended on you to look after the business part of it? A. I suppose a wife would.

The wife on her examination says:—Q. Did you keep any track of these notes, when they were due or anything of that

sort? A. No. Q. You left it in Mr. Livingston's hands? A. Yes; I think I left it in his hands. Q. You have no personal knowledge of the transactions that took place between the late Mr. Counsell and Mr. Livingston, or between Mr. Churchill (her husband) and Mr. Counsell? A. No; I don't know anything about them at all. Q. You left these matters entirely to Mr. Churchill? A. Yes. Q. And you depended upon him entirely to look after them? A. I did, entirely.

This appears to me to be quite sufficient to establish the agency of the defendant, W. Churchill Livingston, for his wife, for the purpose of receiving for her notice of dishonour of the note in question.

Nor, do I agree with the argument addressed to us, that even if the husband were the wife's agent, there should still have been a separate notice for her sent to him in addition to his own notice.

By the Bills of Exchange Act, 1890, sec. 49 (*h*), the notice may be given to an agent, and by sec. 49 (*e*) may be either verbal or in writing.

A verbal notice to an agent, who happened also to be an endorser, would certainly not require to be repeated in order to affect his principal. And I can see no greater reason in the case of a written notice for a vain repetition. Notice is merely knowledge, and the knowledge conveyed by the single notice to the agent at once becomes in law the knowledge of the principal with all its consequences.

As to the question of the sufficiency of the notice in point of form, I have, after a careful examination of many authorities, come to the conclusion that it is sufficient.

Bailey v. *Porter* (1845), 14 M. & W. 44, and *Everard* v. *Watson* (1853), 1 E. & B. 801, are referred to by the learned Chief Justice in his judgment, holding the notice to be sufficient; as also the case of *The Queen* v. *The Bank of Montreal*, 1 Ex. C.R. 171, which was the case of a cheque and to which, therefore, somewhat different considerations apply.

In *Bailey* v. *Porter* the holder of the bill was the banker, at whose bank the bill was payable, a circumstance which has frequently been held to modify the requirements of the notice: *The Bank of Upper Canada* v. *Street* (1846), 3 U.C.R. 29;

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Harris v. *Perry* (1858), 8 C.P. 407; *Paul* v. *Joel* (1858) 3 H. & N. 455, *per* Bramwell, B., at p. 461.

And in *Everard* v. *Watson* there are certainly expressions in the judgments of both Lord Campbell, C.J., and of Erle, J., which indicate that they would probably have held this notice insufficient.

But I do not see how the case in hand can be distinguished from the more recent case of *Paul* v. *Joel*, 3 H. & N. 455 and in Exch. Chamber (1859), 4 H. & N. 355, where a Court composed of such eminent Judges as Wightman, J., Williams, J., Crompton, J., Crowder, J., Willes, J., Byles, J., and Hill, J., sustaining the judgment of Pollock, C.B., Martin, B., and Bramwell, B., unanimously held this notice sufficient: "B.'s acceptance to J. £500, due 12th January, is unpaid—payment to R. & Co. is requested before 4 o'clock."

Nor was this the case of a bill payable at the plaintiff's bank, as will be seen by a reference to the argument in 3 H. & N. at page 458, where Mr. Hannen draws a distinction between it and the case of *Bailey* v. *Porter* on that ground.

See also to the same effect, *Maxwell* v. *Brain* (1864), 10 L.T.N.S. 301; *Bain* v. *Gregory* (1866), 14 L.T.N.S. 601.

It is true, the notice here does not precisely say that the note is unpaid. But one must remember the circumstances. The note was one of a series originally intended, according to the agreement before in part recited, to run if necessary for four years with renewals every three months. The four years had not expired, when this note came due. Under these circumstances, it seems to me, that the notice in question, informing the defendants that the note was due yesterday and to send renewal and renewal expenses was a plain and sufficient notice, that the note was unpaid; and that payment in one way or another was requested, which seems to be all that is required.

I think the appeal fails and should be dismissed with costs.

G. A. B.

[OSLER, J.A.]

IN RE HALTON PROVINCIAL ELECTION.

1902
July 14.

Parliamentary Elections—Recount of Ballots.

Upon the recount of ballots cast at the election of a member for the Ontario Legislature, there being two candidates, ballots were allowed which were marked (1) with a cross below and to the right of the lower compartment; (2) with a cross in one compartment and a line in the other; (3) with a cross in one compartment and a faint and probably unintentional mark in the other; (4) with a mark in the form somewhat of an inverted Λ, as being probably intended for a cross; (5) with three crosses in one compartment; and (6) with a mark which might fairly be taken to be a clumsy and ill-made cross; and ballots were disallowed which were marked (1) with a single stroke—the error in the head-note in *West Huron* (1898), 2 E.C. 58, in which it is stated that ballots so marked were in that case allowed, being pointed out; (2) with a plain cross in one compartment, and a fainter, partly smudged or rubbed out cross in the other; (3) with the name of the candidate written in the compartment; and (4) with a circle in both compartments.

Ballots marked in due form, but with a coloured pencil, were objected to on the ground that there was possibly a design to identify the voters, but these were allowed, there being no evidence, and evidence not being admissible, to shew whether a pencil of this kind had or had not been supplied by the deputy returning officer.

RECOUNT before OSLER, J.A., on the 12th of July, 1902, of the ballots cast at the election of a member of the Ontario Legislature for the Electoral District of Halton, held on the 29th of May, 1902. The facts are stated in the judgment.

J. W. Elliott, and *E. N. Armour*, for the candidate Nixon.

E. F. B. Johnston, K.C., and *W. I. Dick*, for the candidate Barber.

July 14. OSLER, J.A.:—Candidates, Barber and Nixon; majority for Barber, as ascertained by county Judge, 22; recount on appeal by both candidates.

On the candidate Nixon's appeal:

1. Polling subdivisions No. 1 Esquesing, ballot No. 96; No. 3 Nassagaweya, ballot No. 2523; No. 1 Trafalgar, ballot No. 4300; South ward, Milton, ballot No. 5470. These are all marked with a single stroke for Barber and were allowed by the county Judge. They must be disallowed as not being

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properly and sufficiently marked with a cross as required by the Act and directions. I allow the appeal and reverse the county Judge's decision as to these four ballots.

It is convenient to mention here the error which has occurred in the headnote of the report of the West Huron recount before me: *West Huron* (1898), 2 E.C. 58. It is there stated that ballots marked as above were allowed. The opposite was the case. They were disallowed by the county Judge and his ruling was approved by me. I am partly responsible for the mistake as I no doubt saw the proof of the report for correction and overlooked the headnote.

2. Polling subdivision No. 6 Esquesing, ballot No. 954. Ballot with a cross in Nixon's compartment clear and well defined and also a cross quite plain in Barber's compartment. The latter is fainter and the paper surrounding it has a slightly clouded appearance which might be described as a smudge caused by rubbing the finger or thumb over it. The deputy returning officer and the county Judge have not allowed the ballot for Nixon, treating it as one marked for both candidates. I cannot from an inspection of the ballot say with any feeling of certainty that they were wrong in so treating it and in holding that the appearance of the ballot does not evince the voter's manifest intention to obliterate the mark in Barber's compartment as having been made in error. I think it unfortunate that ballots so marked, even where one might guess with reasonable certainty, as in the case of ballot 2402 Nassagaweya, that the voter intended to obliterate the cross by way of correcting a mistake, should be allowed at all. They should be regarded as spoiled ballots. A voter ought to be sufficiently intelligent to know that when he does spoil a ballot he can obtain a fresh one from the deputy returning officer. For the present purpose, however, I dismiss the appeal and affirm the county Judge's decision as to this ballot.

3. Polling subdivision No. 1 Burlington, ballot No. 3472, marked for Barber and counted by the county Judge.

This ballot has the name "Barber" written upon it and following my decision in the *West Huron* case already referred to, and my brother Maclennan's recent decision in *In re North*

Grey Election (1902), 4 O.L.R. 286, I hold that this is not a good ballot and ought not to have been counted for Barber.

I allow the appeal as to this ballot.

4. Polling subdivision No. 2 Acton, ballot No. 1814. The appeal as to this was abandoned and the county Judge's decision stands.

5. Polling subdivision No. 4 Trafalgar, ballot No. 4830, marked with a clear cross on the right of the margin below the lower line of Nixon's field as defined by lines on the ballot paper. This was rejected by the county Judge but claimed for Nixon. Without expressing any opinion of my own on the point, and following my brother Maclennan's recent decision in *In re Lennox Election* (1902), 4 O.L.R. 357, where a similar cross in the margin above the compartment of the candidate first named in the ballot was allowed for him, I allow the appeal and rule that the ballot should be counted for Nixon.

6. Polling subdivision No. 3 Trafalgar, ballot 4619, allowed by the deputy returning officer for Nixon but rejected by the county Judge on the ground that it is clearly marked for both candidates. I think the county Judge right and dismiss the appeal. The cross in Barber's compartment is fainter than that in Nixon's, but inspection satisfies me that one was made as deliberately as the other.

7. Polling subdivision No. 3 Nassagaweya, ballot No. 2527. There is a circle, or nought, in Barber's compartment and a deformed circle in Nixon's. I cannot hold that the deputy returning officer and county Judge were wrong in treating the ballot as a spoiled one, not marked with a cross in Nixon's compartment.

Appeal as to this ballot dismissed.

8. Polling subdivisions No. 6 Esquesing, ballot No. 1015, and No. 3 Trafalgar, ballot No. 4717. A cross in Barber's compartment and a line in Nixon's. Counted by the county Judge for Barber. Appeals dismissed.

On the candidate Barber's appeal:

1. Two cases similar to No. 8 of Nixon's appeal. Appeal dismissed.

2. Polling subdivision No. 1 Acton, ballot No. 1585, ballot marked with a clear cross for Nixon and so allowed by the

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county Judge. There is a faint mark in the upper or Barber's compartment which is said to be a cross and to have the effect of spoiling the ballot. The mark bears every appearance of being a mere unintentional one. I think the ballot was well counted for Nixon, and dismiss the appeal.

3. Polling subdivision No. 3 Esquesing, ballot No. 2149, allowed by the county Judge for Nixon. This ballot may properly stand as counted. There are two plain strokes united at the top and forming an inverted Λ plainly, though not very widely apart at the bottom. Enough appears to shew that the voter meant to make a cross and not a single straight stroke. Appeal dismissed.

4. Polling subdivision No. 3 Esquesing, ballot No. 413, allowed by the deputy returning officer and county Judge for Nixon, marked with three clear crosses in a line for Nixon. This must be upheld as a good ballot. I have read the cases of the *Monck Election* (1874), H.E.C. 735, and the *Bothwell Election* (1884), 8 S.C.R. at pp. 718, 719, which fully support Mr. Elliott's contention. Appeal dismissed.

5. Polling subdivision No. 1 Nassagaweya, ballot No. 2048. Appeal dismissed; marked and counted for Nixon; the cross is well enough for a ballot though clumsy and ill made.

6. Polling subdivision No. 5 Trafalgar, ballot 4998; appeal abandoned.

7. Polling subdivision No. 3 Oakville, ballots Nos. 4058, 4073, 4077, 4098 and 4099, rejected by the deputy returning officer but counted by the county Judge for Nixon. Each is well marked with a plain cross in Nixon's field. The cross is made with blue or indelible, or at least not with a common black pencil, and the ballots are objected to as offending against the requirements of secs. 31 (3) and 71 of the Election Act, not being marked with the pencil provided by the deputy returning officer for the use of voters, and thus shewing marks of some common design to disclose the identity of the voter.

On an enquiry of this kind evidence cannot be received by the Judge; he deals with the ballots in the condition in which they come before him. It might have been just as forcibly argued by the counsel for Nixon that other ballots marked in black pencil were objectionable for the same reasons which are

urged against these five. I do not know, nor do counsel know, nor does the county Judge, that the pencil with which these ballots were marked was not supplied by the deputy returning officer. Nor do we know on what ground that official rejected the ballots in question.

All this may appear upon a scrutiny but with what result as affecting these ballots I cannot now say, nor have I the right to express an opinion.

The appeal as to these ballots must be dismissed.

The certificate for the county Judge can be drawn up embodying the result as above expressed.

For the reasons I gave in the *West Huron* case, and on which in these cases of recounts I have been in the habit of acting, I make no order as to costs.

R. S. C.

[FERGUSON, J.]

1902

Aug. 26.

LAISHLEY v. GOOLD BICYCLE COMPANY.

Master and Servant—Dismissal of Servant—Damages—Percentage on Sales.

The plaintiff, who had been employed by the defendants as manager, receiving a salary and a percentage on moneys received from sales, and had been dismissed upon the sale by the defendants of their business before the expiration of his engagement, was held entitled, *primâ facie*, as damages to the amount of his salary for the unexpired term of his engagement and of the percentage on moneys received after his dismissal in respect of sales previously made, but not to the percentage upon the amount of sales which, it was contended, would have been made during the unexpired term had the business been carried on, the evidence in support of that claim being too speculative and uncertain.

But the plaintiff having, shortly after his dismissal, obtained other employment, and having received in respect thereof remuneration to a larger amount than the damages calculated as aforesaid, it was held that his action failed, and it was dismissed with costs.

ACTION for damages for wrongful dismissal, tried at Toronto in May, 1902.

Watson, K.C., and *S. C. Smoke*, for the plaintiff.

Wallace Nesbitt, K.C., and *H. S. Osler*, for the defendants.

August 26. FERGUSON, J.:—The defendants were manufacturers of bicycles, their factory being carried on in the city of Brantford. By an agreement bearing date the 3rd day of December, 1897, they (the defendants) employed the plaintiff in the capacity of manager of their business and particularly in the sales and collection departments thereof to be carried on in the territory specified in the agreement.

The document stated that the term of such employment should be three years beginning with the 1st day of January, 1898, or so soon thereafter (not later than the 15th day of January, 1898) as the plaintiff should be able to enter upon the employment.

The territory over which the agreement extended is stated in the document. At first this was a limited territory. There were, however, provisions whereby after the expiration of the first year, the extent of the territory might, at the option of the defendants, be increased and the remuneration to the plaintiff in some respects varied as the territory increased. The plaintiff

entered the service or employment under the agreement, and all seems to have gone well till near the close of the second year when the defendants sold their business, and nearly all their stock in the business, to an amalgamated company, and by a letter of the 17th day of November, 1899, dismissed the plaintiff from the employment. This I may say appears to have taken place without any fault on the part of the plaintiff or any reason for the dismissal, except the fact that the defendants had sold their business and, of course, did not intend to continue it as before and no longer needed the services of the plaintiff. The employment of the plaintiff was for the positive and definite period of three years. His remuneration was to be $20 per week and certain percentages or commission on the moneys that he would send in to the defendants, proceeds of the sales of bicycles by him or sales made by the sub-agents employed by him under the terms of the agreement, as well as a premium of fifty cents on each bicycle sold or rented. The $20 per week was to continue throughout the employment, the three years. The commissions varied as the defendants exercised options given them by the agreement, and in a certain event, or in certain events, the premium of fifty cents was to cease.

As will be seen there was, at the time of the dismissal of the plaintiff, of the three years yet to come and unexpired a period of one year and about six weeks. In the first place, as they then existed the plaintiff was by the terms of the agreement to be paid $20 per week for this period and to have a commission of three per centum upon all moneys sent in as above, and these two were to be his reward for and during this period of one year and six weeks. The sales of the bicycles were, and were intended to be, to a large extent upon credit—that is, partly for cash and partly on credit, and usually payable by instalments after the manner of doing business or making sales adopted by the Singer Sewing Machine Company. It followed from this that a large part of the moneys, the price of bicycles sold in any one season, would not be collected and could not be sent in to the defendants till the season following the season in which the sales were made, and at the time of the dismissal of the plaintiff there was a large amount arising from sales made in the year 1899 to be collected and sent in to the defendants

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during the following season, 1900, the last year of the employment, and upon this sum the plaintiff would be entitled to three per centum commission, but having been dismissed by the defendants from the employment the plaintiff could not make these collections so as to send in the money to the defendants. These collections were made by the defendants through another agent, a Mr. McPherson.

It appears by the evidence that the defendants at and before the time of the dismissal of the plaintiff were becoming embarrassed financially and had not sufficient capital to continue their manufacturing business as before.

The agreement contains a clause in these words :—

"16. The company agrees to supply to the Goold Bicycle Company, Limited, Toronto, bicycles and parts thereof sufficient from time to time to fill the orders obtained therefor by the said Laishley and the other employees of the company within the said territory, unless the company is prevented from so doing by strikes or accidents, or other causes entirely beyond the company's control."

The business was all to be done in the name of the defendants, and "The Goold Bicycle Company, Limited, Toronto," meant the plaintiff Laishley.

Sometimes the supplies of bicycles were sent by the defendants directly from their factory at Brantford to agents appointed by the plaintiff for the purpose of making sales of bicycles and collecting the prices, but all under the instructions and supervision of the plaintiff; and these sub-agents under the plaintiff are the persons meant by the words in this clause "and the other employees of the company."

A very considerable discussion took place in regard to the construction of the latter part of this clause on the argument. This discussion was as to whether or not the rule commonly known as *ejusdem generis* is to be applied in construing it. Without delaying to state reasons at large, I may say that my opinion is that the rule does not apply because the particular words employed, "strikes" and "accidents," are not, according to their respective significations, words belonging to the same *genus* or of the same nature, and for this reason the use of them does not control or restrict the meaning of the concluding

general expression "or other causes entirely beyond the company's control." This, however, as it seems to me, is not of great materiality for the cause set up or spoken of as beyond the company's control was their financial inability. And, as I think, one should hesitate long before saying that one should not be held liable for the performance of his covenants and agreements because of his financial inability to perform, although such inability should appear to have arisen in the progress of his business and in some sense beyond his control. I think a person who enters into a covenant or agreement undertakes as to this in the outset.

Then there is in this case a positive hiring or employment for the three years and a covenant or agreement on the part of the defendants to supply the bicycles or parts thereof to be sold, etc. Financial inability may make a vast difference in regard to actual performance, but not so, as I think, in regard to the liability to perform.

It is not disputed that the plaintiff is entitled to the $20 per week for the period of the three years that was unexpired at the time of the dismissal or to the commission of three per cent. upon the amount collected as aforesaid by the defendants in respect of sales made in the second year (1899).

The plaintiff, however, makes a very large claim for gain that in his opinion he would have made and realized in respect of sales in the season of 1900 had the business been carried on as at first intended. This claim seems to be founded upon conjecture. It is purely speculative, and the evidence in support of it is too uncertain. The case *Washburn* v. *Hubbard* (1872), 6 Lans. 11, was a case for breach of contract to continue the plaintiff as the defendants' agent for the sale of car springs and allow him a commission on the sales, and it was held that evidence of the amount of profits which might have been made during the time of the contract, based upon a calculation of the probable amount of sales during such term, was inadmissible to establish the plaintiff's damages. In delivering the judgment the Court said: "Estimates of probable sales furnish no proper criterion for fixing damages. Actual damages and actual loss of profits only can be recovered." In the case *Union Refining Co.* v. *Barton* (1884), 77 Ala. 148, the agent had

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been employed to introduce, and establish a market for the sale of, the company's oils in the State of Georgia, which oils the company was by the contract to furnish him. The agent was to have the sole right of selling the company's oils in Georgia through himself and his sub-agents, and he was to receive as compensation ten per centum of the amount of his sales. It was held that in an action for breach of such contract on the part of the company the agent could not recover as damages the supposed profits which he would or might have realized from sales during the entire period stipulated for the continuance of the contract. Such damages are entirely speculative, and no rule can be laid down by which they can be accurately ascertained or measured. In delivering judgment the Court said: "No rule for such ascertainment (of damages) can be predicated. Past success in the same or a similar enterprize will not do; conditions may not always remain the same." In that case the Court referred to a former case decided in the same term, *Brigham* v. *Carlisle* (1884), 78 Ala. 243, in which the subject was, as they say, more fully dealt with, and on examination of this last case referred to one finds the same results and for the same reasons.

The case *Beck* v. *West & Co.* (1888), 87 Ala. 213, was the case of a contract for the sale of tobaccos by a travelling salesman, the compensation to be one half of the profits on all sales effected by him. It was held in an action against the defendants for breach of contract that the agent was entitled to receive his share of the profits on sales made by him. "So, if he had agreements for later sales, which he could have perfected during his term, he is equally entitled to his share of the profits. But to fall within this class, the negotiations must have proceeded so far as that it can be ascertained with certainty that the sale would be made and the extent of it. Mere expectations, doubtful offers, or other vague or indefinite assurances to purchase, without expression of quantity or value, must be classed as speculative and hence not recoverable. . . Opinion as to what sales he could, or probably would, have made all fall within the category of the speculative, are contingent, and do not tend to shew a right of recovery."

I may here say that in searching I have found a very considerable number of cases in the States of the United States the decisions in which are on the same lines as the cases above alluded to. These seem to me to be more immediately applicable to the present case than the English cases referred to on the argument on account of their facts more closely resembling the facts of the present case.

I have, however, read and carefully considered all the cases referred to by counsel, as well as those referred to above, and I have arrived at the conclusion that the plaintiff has not proved by proper evidence the damages that he claims as loss of commission, etc., on sales that might have been effected during the period of his employment and after his dismissal from the employment, the evidence being too conjectural, speculative, and uncertain.

It is undisputed, however, that the plaintiff is entitled to $20 per week during the period, which would amount to $1140, and to a commission of 3 per cent. upon $36,000 collected by the defendants for business done in 1899, which amounts to $1080, making together the sum of $2220.

It was contended that there had been waste in the collection of the $36,000 and that the amount would have been much larger if the collection of it had been done by the plaintiff. I have considered the evidence bearing upon the question, and particularly the evidence of Mr. McPherson, the man who attended to the collections, and have taken into account the fact that the defendants in making the collections were collecting their own money, and I have arrived at the opinion that the plaintiff has not established this proposition.

The two sums coming to the plaintiff are, as above, the $20 per week for one year and about six weeks, $1140, and 3 per centum upon $36,000 collections, $1080 ; making, $2220.

Then the plaintiff obtained immediately upon being dismissed appropriate employment in which during the same period he earned and was paid $3300, which should in the ordinary case be subtracted from the damages recoverable for a wrongful dismissal. But in this case the amount realized by the plaintiff during the period exceeds the amount of his damages, and there are, therefore, no damages coming to him.

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No cross relief is claimed and the result will be a dismissal of the action.

The common rule is that the costs follow the event unless there is some sufficient reason to the contrary. In this case I do not discover any such sufficient reason and the action will be dismissed with costs.

Action dismissed with costs.

R. S. C.

[IN THE COURT OF APPEAL.]

TAYLOR

v.

THE GRAND TRUNK RAILWAY CO.

C. A.
1902.
June 28.

Railway — Return Ticket — Condition of Identification—Neglect to comply with —Removal from Train.

Plaintiff purchased an excursion ticket from Indian Head, N.W.T., to Toronto and return, one of the conditions, which he signed, being that he should identify himself to the authorized agent of the railway in Toronto before he set out on his return journey, and obtain the agent's official signature, dated and stamped at Toronto. On production of his ticket he secured his sleeping berth, had his baggage checked and was admitted to the train and started on his return journey, but neglected to identify himself as required and was put off the train, after he had refused to pay his fare, although he offered to identify himself to the conductor. In an action for damages :—
Held, that he could not recover.
Judgment of Lount, J., affirmed.

THIS was an appeal by the plaintiff from the judgment at the trial in an action, brought by Richard Taylor against the Grand Trunk Railway Company of Canada, for damages for putting him off a train.

The action was tried at the assizes held at Toronto on the 10th January, 1902, before Lount, J., with a jury.

H. T. Beck and *J. R. Code*, for the plaintiff.
W. Cassels, K.C., for the defendants.

It appeared that the plaintiff had purchased an excursion ticket to take him from Indian Head in the North-West Territories to Toronto and return, within three months, subject to eleven conditions printed on it and to certain coupons attached. At the end of the conditions these words were printed:

"I hereby agree to all the provisions of the above contract and attached coupons;" which the plaintiff signed when he purchased the ticket.

The seventh condition was in these words:

"7th. That it" (the ticket) "will not be good for return passage, unless the holder identifies himself as the original purchaser, to the satisfaction of the authorized agent of the

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Grand Trunk Railway system at Toronto, in sufficient time to permit of return trip and arrival at original starting point on or before March 19th, 1901; and unless officially signed and dated in ink and duly stamped by said agent."

The plaintiff, on production of his ticket at Toronto to the official of the Canadian Pacific Railway, secured his sleeping berth from North Bay to Indian Head; had his baggage checked by the Grand Trunk Railway; and was admitted to the train: but neglected to identify himself and get the agent's signature and date, and started on his return journey from Toronto on the 14th February. He was put off the train at Richmond Hill, a short distance from Toronto, by the conductor, after having refused to pay his fare, although he offered to identify himself to the conductor.

The trial Judge dismissed the action with costs, after allowing it to go to the jury to fix the damages, if any; which they did at $500.

From this judgment the plaintiff appealed and the appeal was argued in the Court of Appeal on the 16th April, 1902, before OSLER, MACLENNAN, MOSS, and GARROW, JJ.A.

Beck, for the appeal. The plaintiff was entitled under the Railway Act on payment of his fare to be carried with his baggage without any conditions: 51 Vict. ch. 29, sec. 246 (D.). If special conditions are imposed, the defendants should shew that the plaintiff was informed of them and that he was being carried at less than the lawful fare. The evidence shews that the plaintiff was not aware of the conditions, and the fact that he signed them does not necessarily bind him: *Bate* v. *The Canadian Pacific Railway Co.* (1887), 14 O.R. 625, (1888), 15 A.R. 388, (1889), 18 S.C.R. 697; *Richardson, Spence & Co.* v. *Rountree*, [1894] A.C. 217; *Harris* v. *The Great Western R.W. Co.* (1876), 1 Q.B.D. 515: *Watkins* v. *Rymill* (1883), 10 Q.B.D. 178; *Henderson* v. *Stevenson* (1875), 2 H.L. Sc. 470; *Parker* v. *The South Eastern R.W. Co.* (1877), 2 C.P.D. 416. It should have been left to the jury, to find whether the plaintiff knew that the ticket contained a condition, requiring him to identify himself and sign the ticket:

or whether he knew he was travelling at less than the ordinary fare: and whether the defendant did what was reasonable to give him notice of any conditions. In any event, the company waived the conditions, by accepting his ticket as sufficient to obtain a sleeping berth, by checking his baggage, and by admitting him to the train at the station. Condition 5, which provides that "the purchaser will write his signature, when requested to do so by the conductors or agents," is in substitution of condition 7, as soon as the passenger is admitted to the train. Condition 7 is unreasonable and contrary to the policy of the Railway Act, R.S.C. 1886, ch. 110, sec. 10. The defendants had no right to eject the plaintiff, without refunding the cost of the ticket, less the single fare: R.S.C. ch. 110, sec. 9. The onus is on the defendants, to shew that the plaintiff had not paid his fare, the production of the ticket being *primâ facie* evidence that he had done so: *The Grand Trunk R.W. Co.* v. *Beaver* (1894), 22 S.C.R. 498; *Butler* v. *The Manchester, Sheffield and Lincolnshire R.W. Co.* (1888), 21 Q.B.D. 207.

Cassels, K.C., contra. The plaintiff is an intelligent man and was in no way misled by any agent of the defendants, and no misrepresentations were made to him. There would be no safety in contract, if the plaintiff could say he did not read it and so avoid its conditions: *Bate* v. *The Canadian Pacific Railway Co.*, 14 O.R. *per* Rose, J., at p. 636, 15 A.R. *per* Patterson, J.A., at p. 398; although in that case the plaintiff could not read and was misled as well; and *The Great Western Railway Co.* v. *McCarthy* (1887), 12 App. Cas. 218, *per* Lord Herschell, at p. 227, and *per* Lord Bramwell, at p. 240. The contract here was a valid contract: *Dancey* v. *Grand Trunk R.W. Co.* (1892), 19 A.R. 664, *per* Osler, J.A., at p. 669. The sleeping car clerk, the baggage man and the station man may all have looked at the ticket but none of them were agents of the company to waive any conditions of the plaintiff's ticket contract. The plaintiff was rightfully put off the train: *The Grand Trunk R.W. Co.* v. *Beaver*, 22 S.C.R. 498. I refer also to *Daniels* v. *Florida Cent. & P.R. Co.* (1901), 39 S.E. Reporter 762.

Beck, in reply.

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June 28. OSLER, J.A.:—The plaintiff's case is that he was rightfully on the train, to be carried under the terms of a contract, evidenced by the ticket which he produced and shewed to the conductor. The ticket was issued by the Canadian Pacific Railway Company, part of the journey covered by it being, by arrangement between that company and the defendant company, over one of the lines of the latter. It was such a ticket as the company might lawfully issue, and it was made subject to certain conditions which might be lawfully imposed upon any one who chose to accept it with the privileges it conferred. On its face it purports to be an excursion ticket for a journey from Indian Head, North-West Territories, to Toronto and return. It sets forth plainly and in legible form the conditions of the contract; and the plaintiff signed it, as he was required to do.

By the clause immediately above his signature he declares that he agrees to all the provisions of the contract.

He bought it on the 19th December, 1900, and travelled on it to Toronto. It remained in his possession until the 14th February, 1901, when he started on his return journey. Shortly after the train left Toronto, the conductor called for the ticket and on seeing it, at once told the plaintiff that he was not authorized to accept it; and that it could not be used for the return journey, because the seventh condition of the ticket had not been complied with. The plaintiff accordingly left the train at Richmond Hill, and was carried back on the next train to Toronto without charge. There he did and procured to be done, what was necessary to validate the ticket for the return journey, and then travelled on it home.

There was no evidence of any misrepresentation to the plaintiff by the agent at Indian Head when he bought the ticket, or that it was difficult to read, or that the plaintiff himself was unable to read, either from want of education or physical infirmity. The plaintiff simply put the ticket in his pocket, without reading it and, in fact, never read it.

It was proved, that the ticket had been produced and shewn to the baggageman, when the plaintiff had his baggage checked,

and also to the gateman, when he passed through the waiting-room to the train.

The seventh condition or rather stipulation of the contract, printed on the ticket, provides that the ticket (which by another condition is declared to be not transferable) will not be good for the return passage, unless the holder identifies himself as the original purchaser to the satisfaction of the authorized agent of the Grand Trunk Railway system at Toronto, in sufficient time to admit of the return journey and arrival at the original starting point, on or before 19th March, 1901, and unless officially signed and dated in ink and stamped by said agent.

I think that this is a very clear case. The plaintiff knew that what he was getting was an excursion ticket, at a special and reduced rate and in a special form, though I lay no particular stress upon that. But he could read; the terms of the proposed contract were before his eyes and he signed it.

There was no fraud or misrepresentation of any kind by the agent of the company, who sold him the ticket. There was a completed contract, the plaintiff's part in which is proved by his signature.

The case is very different from *Henderson* v. *Stevenson*, 2 H.L. Sc. 470, and *Richardson, Spence & Co.* v. *Rountree*, [1894] A.C. 217, where the plaintiff did not sign the proposed contract, and where, under the circumstances, it was held to have been rightly inferred, that he (or she) had not assented to the conditions or terms proposed by the company when selling the ticket.

And it differs also from *Bate* v. *Canadian Pacific Railway Co.*, 15 A.R. 388, 18 S.C.R. 697, where, although the plaintiff did sign the ticket, it was found that she had done so under a misapprehension as to the reasons for or object of signing it, induced by the ticket agent; and she was labouring under a physical infirmity which disabled her from reading it.

There is, therefore, nothing in the facts of this case which would have justified the learned trial Judge in leaving it to the jury to find whether or not the appellant knew that the ticket contained the condition for non-compliance with which the conductor refused to pass him on his return journey; or whether or not the officer of the company, by whom the ticket

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was issued, did what was reasonable and sufficient to give the plaintiff notice of the conditions.

The case is the ordinary one alluded to by Mellish, L.J., in *Parker* v. *The South Eastern Railway Co.*, 2 C.P.D. 416, at p. 421, where an action is brought on, or attempted to be supported by, a written agreement signed by the party: "the agreement is proved by proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents."

With this accords the decision in *Daniels* v. *Florida Cent. & P. R. Co.*, 39 S.E. Reporter, 762 (Sup. Ct. South Carolina, 1901), that where a person of ordinary intelligence signs a railway excursion ticket, it will be presumed that he knew and assented to its conditions, though it was not read before or after signing it, nor its contents called to his attention.

See also *Robertson* v. *The Grand Trunk R.W. Co.* (1895), 24 S.C.R. 611, and *New York Life Ins. Co.* v. *McMaster* (1898), 87 Fed. Rep. 63, where it is said, speaking of an application for a policy, signed by the applicant, at p. 67: "If one can read his contract, his failure to do so is such gross negligence that it conclusively estops him from denying knowledge of its contents, unless he was dissuaded from reading it by some trick, artifice, or fraud of the other party to the agreement."

It was strongly contended by Mr. Beck, that the plaintiff having had his baggage checked by the baggageman, and having been admitted through the passengers' gate by the gateman, the defendants were precluded from insisting upon the performance of the condition which he had agreed to. But I think, this contention cannot be supported. The terms of the condition are plain, and it does not appear that the servants of the company referred to had any authority to waive them. The only officials to deal with the ticket, as entitling the plaintiff to be upon the train for passage on his return journey, were the agent by whom he was to be identified and the conductor; and for aught the baggageman and gateman knew to the contrary, the plaintiff would have his ticket duly marked by the agent before he entered the train. This he knew, or should have known it was his duty to have had done by the proper officer before he attempted to make any use of it, and, that being so,

he cannot insist that he was misled by anything done by the other servants of the company without authority.

The judgment at the time dismissing the action must, therefore, be affirmed.

MACLENNAN, J.A.:—I am of opinion that the appeal fails.

The plaintiff, a business man residing at Indian Head, Assinaboia, North-West Territories, was about to visit Toronto for a time, and on the 15th December, 1900, applied to the Canadian Pacific Railway Company for a return ticket.

He obtained one, entitling him to travel over the Canadian Pacific line to North Bay, and thence over the defendants' line to Toronto, and to return by the same route. The ticket is an excursion ticket, entitling the plaintiff to return at any time on or before 19th March following, a period of three months.

The ticket is in the form of a contract, containing certain stop-over privileges and other stipulations, and is made subject to conditions governing reduced rate tickets. This contract and these stipulations are plainly printed on the face of the ticket, with four coupons attached for the corresponding four sections of the round journey.

On obtaining his ticket, the plaintiff was asked to sign the ticket, which he did, at the end of the contractual part, thus:

"I hereby agree to all the provisions of the above contract. and attached coupons. R. TAYLOR."

One of the stipulations contained in the contract is this: (setting out the seventh condition).

Each of the four coupons has plainly printed on the face of it the words: "On conditions named in contract."

What the plaintiff says is, that he did not read the contract which he was asked to sign and which he did sign, and so was not bound by the stipulations contained in it. And he relies on *Bate* v. *Canadian Pacific Railway*, 15 A.R. 388, and 18 S.C.R. 697; and upon *Henderson* v. *Stevenson*, L.R. 2 H.L. Sc. 470; *Parker* v. *The South Eastern R.W. Co.*, 2 C.P.D. 416; and *Richardson, Spence & Co.* v. *Rountree*, [1894] A.C. 217.

The present case, however, is as different as possible from those cited. The ground of the decision in the *Bate* case is

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explained by the Chief Justice in *Robertson* v. *The Grand Trunk R.W. Co.*, 24 S.C.R. 611 at p. 617.

In the present case, the plaintiff was not asking for a ticket for an ordinary single journey, but for a special contract, namely, a return journey, which it was entirely optional with the company to grant. That being so, there was nothing to put him off his guard, and when he was asked to sign the document, which he received and paid for, I think he was as much bound by its terms, whether he read it or not, as in the case of any other business transaction.

But for the contract, he had no right to travel upon the defendants' railway at all, and in order to exercise that right he was bound to conform to the condition on which it was granted, and to which he had assented by his signature.

MOSS, and GARROW, JJ.A., concurred.

G.A.B.

[DIVISIONAL COURT.]

MASON v. LINDSAY.

D. C.
1902
Aug. 22.

Sale of Goods—Conditional Sale—Name of Vendor—R.S.O. 1897, ch. 149—Option to Purchase.

Upon a piano made by a company whose corporate name was "The Mason & Risch Piano Company, Limited," and place of business Toronto, claimed by them in replevin as against a mortgagee thereof, there were painted the words "Mason & Risch, Toronto:"—

Held, that if the transaction came within the Conditional Sales Act, R.S.O. 1897, ch. 149, this was not a compliance with the provisions of section 1 of that Act.

But held also that the transaction did not come within the Act, the mortgagor not being bound by the agreement under which the piano was in his possession to purchase the piano, but having merely the option to purchase it, and not having exercised that option.

Helby v. *Matthews*, [1895] A.C. 471, distinguished and applied.

Judgment of Lount, J., affirmed on other grounds.

APPEAL by the defendant from the judgment at the trial.

The action was one of replevin, and the article in question was a piano manufactured by the plaintiffs, who were manufacturers of and dealers in pianos, having their factory and place of business at Toronto. The piano was claimed by the defendant under a chattel mortgage made in his favour by one George Thody, of St. Thomas, who had received the piano from the plaintiffs under the following agreement:—

"Received from The Mason & Risch Piano Company, Limited, one Mason & Risch piano, W.K. No. 6069, stool, and drape, on hire for forty-three months at seven dollars per month, payable in advance, the said pianoforte. stool and drape being valued at $300, which sum I agree to pay in the event of the said instrument being injured, destroyed, or not being returned to The Mason & Risch Piano Company, Limited, on demand, free of expense, in good order, reasonable wear excepted, and should the above period be extended, this agreement shall continue binding.

It is agreed that I may purchase the said pianoforte, stool and drape for the sum of three hundred dollars, payable as follows: twenty-five dollars each and every three months from date until paid together with interest at seven per cent. per annum on unpaid principal, but until the whole of

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the purchase money and interest be paid, the said pianoforte, stool and drape shall remain the property of The Mason & Risch Piano Company, Limited, on hire by me, and shall not be moved from the premises where now delivered without the written consent of The Mason and Risch Piano Company, Limited. And in default of the punctual payment of any instalment of the said purchase money, when it falls due, according to the times above stated respectively, or at any time or times to which the payment thereof, or any part thereof, may hereafter be extended, or of the said monthly rental in advance; or in case the said instrument shall be removed, or any attempt made, or threatened, to move it from the said premises without such written consent, The Mason & Risch Piano Company, Limited, or their agents, may, using such force as may be required, without rendering themselves liable to any action or actions for so doing, enter upon the premises where the said pianoforte, stool and drape may be, and resume possession thereof, without any previous demand, although a part of the purchase money may have been paid, or a note or notes, bill or bills of exchange, given on account thereof, and although the same may be then outstanding under discount, this agreement for sale being conditional, and punctual payment being essential to it. If possession is resumed, as aforesaid, all instalments of rent to date of taking possession shall be forthwith paid by me, together with any damages the instrument may have sustained beyond any ordinary wear, and all expenses incurred in connection with this contract, and the carrying out of the same on the part of the said Mason & Risch Piano Company, Limited, and all costs and expenses connected with taking possession of the said instrument, or otherwise occasioned by my default. But any sum received as aforesaid is to be repaid to me, and any notes or bills of exchange received on account of the purchase money are in such event to be returned to me at maturity. On payment in full of purchase money and interest, no rent or hire is to be charged to me. Any notes or bills of exchange, or other securities given by me, are only collateral, and are not in any way to relieve me from payment according to the terms thereof.

And it is further agreed that this receipt and agreement embodies the whole of the agreement between myself and The Mason & Risch Piano Company, Limited, with respect to said pianoforte, stool and drape, and I hereby waive all verbal agreements not embodied herein, and agree that I am not entitled to receive credit at any time for any moneys which may be received by The Mason & Risch Piano Company, Limited, by the discount of any of the notes or bills of exchange which may have been taken by them on account of said purchase money. I hereby acknowledge to have received a copy of this agreement.

Toronto, Dec. 21, 1897. George Thody."

This agreement was not filed in the office of the clerk of the county court, but there were painted or stamped upon the piano the words "Mason & Risch, Toronto," the plaintiffs being the only piano manufacturers in Toronto having a name at all like this. The chattel mortgage of the defendant was made on the 25th of March, 1901, to secure $111 and interest, and covered other chattels as well as the piano, which was described in it as a Mason & Risch piano. A solicitor acted for the mortgagee, who, on inquiry from Thody, was told by him that the piano was his, and he did not make any attempt to communicate with the plaintiffs. Thody left St. Thomas in June, 1901, and the defendant seized the piano and other chattels, realizing from the sale of the chattels $50. Thody had not kept up his payments under his agreement with the plaintiffs, who replevied the piano.

The action was tried at London on the 4th of November, 1901, before Lount, J., who held that the defendant was a "mortgagee without notice in good faith," but that, assuming the case to come within the Conditional Sales Act, R.S.O. 1897, ch. 149, the provisions of section 1* had been substantially complied with, and he gave judgment in the plaintiffs' favour.

*Section 1. Receipt notes, hire receipts and orders for chattels given by bailees of chattels, where the condition of the bailment is such that the possession of the chattel passes without any ownership therein being acquired by the bailee until the payment of the purchase or consideration money or some stipulated part thereof, shall only be valid as against subsequent purchasers or mortgagees without notice in good faith for valuable consideration in the case of manufactured goods or chattels, which at the time possession is given to the

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The appeal was argued before the Divisional Court (MEREDITH, C.J.C.P., and FERGUSON, J.) on the 25th February, 1902.

Joseph Montgomery, for the appellant. The provisions of section 1 of the Conditional Sales Act have not been complied with. The words "Mason & Risch, Toronto," are in no sense the name and address of the vendors of this piano. It is not necessary for the appellant to contend that absolute accuracy is essential, but there must be at all events enough to identify the vendor. It would not perhaps be reasonable to say that the word "the" in the corporate name of the vendors is essential, but there should at least be something to shew that the vendors are a corporation. The words here in question might reasonably be looked upon as merely the name of the piano itself. *Morey* v. *Brown* (1861), 42 N.H. 373, under a somewhat analogous statute, shews what strictness is required, and the principle applies here. The defendant, as has been found by the learned Judge, advanced his money in good faith and should be protected.

Strachan Johnston, for the respondents. The purpose of the Act is merely to enable any person wishing to obtain information to know where to apply for it, and there was certainly enough direction given in this instance. A letter addressed "Mason & Risch, Toronto," would have reached the plaintiffs, and the mortgagee took the risk of making no inquiries. The addition of the word "company" would have served no useful purpose, and would have been an unnecessary accessory. Substantial compliance is sufficient: Maxwell, 3rd ed., pp. 84, 131; *Wettlaufer* v. *Scott* (1893), 20 A.R. 652. But the Act does not apply at all to this transaction. The instrument is really a lease with an option to purchase, and this option has not been exercised. The monthly payments of rent may be applied, it is true, on account of purchase money if the lessee wishes to purchase, but until he makes his election to

bailee, have the name and address of the manufacturer, bailor, or vendor of the same painted, printed, stamped or engraved thereon or otherwise plainly attached thereto, and no such bailment shall be valid as against such subsequent purchaser or mortgagee as aforesaid, unless it is evidenced in writing, signed by the bailee or his agent.

purchase he is merely a lessee, and could not be sued as a purchaser. This is in effect like the case of *Helby* v. *Matthews*, [1895] A.C. 495, the principle of which is applicable here.

Montgomery, in reply. The true intention was evidently to sell the piano, and the substance and not the mere form of the transaction must be looked at. If a letter of inquiry had been sent to "Mason & Risch, Toronto," and no answer had been received, it is evident that the liability to a penalty under the Act would not have arisen.

August 22. MEREDITH, C.J.:—The action is in respect of a piano belonging to the respondents, which was in the possession of one Thody under an agreement between him and the respondents, to which I shall afterwards refer, at the time he mortgaged it to the appellant, and the question for decision is whether the respondents are prevented from setting up their title to the piano as against the appellant by reason of the provisions of the Act respecting Conditional Sales of Chattels, R.S.O. 1897, ch. 149.

The contention of the appellant is that the Act applies, and that the agreement not having been filed pursuant to section 2, and the piano not having had, as he contended it had not, painted, printed, stamped or engraved on it, or otherwise plainly attached to it, the name of the respondents, who were the manufacturers, bailors, or vendors of it within the meaning of the Act, as he also contends, it is invalid as against him as a subsequent mortgagee.

The respondents were the manufacturers of the piano, and their corporate name is The Mason & Risch Piano Company, Limited, and their place of business Toronto, and there was admittedly a sufficient compliance with the provisions of the Act to which I have referred, if stamping of the words "Mason & Risch, Toronto," was a stamping on the piano of the name and address of the manufacturer, bailor or vendor within the meaning of section 1.

I have no doubt that stamping the piano with the name "Mason & Risch" afforded all the means of information to intending subsequent purchasers or mortgagees that the Legislature intended to be placed within their reach by the

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requirement of section 1 as to the name of the manufacturer, bailor, or vendor, but unfortunately, as I think, the legislation does not permit of the Court holding that anything other than that which it has prescribed as necessary shall be a compliance with the statute, even though what is done is in the opinion of the Court as effective for the end which the Legislature intended to attain as that which it has required to be done to protect the common law right of the owner of the chattel.

The decided cases on analogous statutes, in my opinion, compel us to give this strict construction to the language of section 1.

In *Low* v. *Routledge* (1864), 33 L.J. Ch. 717, it was held by Vice-Chancellor Kindersley that the entry of the name "Sampson Low, Son & Marston" as that of the publisher, the firm name being "Sampson Low, Son & Co.," was not a compliance with the provision of the Copyright Act, 4 & 5 Vict. ch. 45, sec. 13, which required the name and place of abode of the publisher to be entered in the registry book of the Stationers' Company.

In *Penrose* v. *Martyr* (1858), E. B. & E. 499, it was held that the defendant was liable as acceptor of a bill of exchange drawn on "The Saltash Watermen's Steam Packet Company, Saltash," and accepted by him as secretary of the company, the name of the company being "The Saltash Watermen's Steam Packet Company, Limited," because of the provisions of the Joint Stock Companies Act, 1856, 19 & 20 Vict. ch. 47, sec. 31, which made any officer of a limited company or any person on its behalf who signed on behalf of the company any bill of exchange wherein the name of the company was not mentioned in characters easily legible, liable.

In *Atkin & Co.* v. *Wardle* (1889), 61 L.T.N.S. 23, the bill of exchange was drawn on the "Salt Water Baths Company, Limited, South Shields," its registered name being "South Shields Salt Water Baths Company, Limited," and two directors of the company who had accepted the bill, adding after the names of their offices in the company the words "South Shields Salt Water Baths Company," were held personally liable on it, one of the grounds of the decision being that the name of the company, which was a limited company,

was not mentioned in legible characters in the bill as required by section 41 of the Companies Act, 1862, (25 & 26 Vict. ch. 89), and that by section 42 the directors were personally liable for the amount of the bill, any director, manager, or officer of the company who signed on behalf of the company any bill of exchange wherein its name was not mentioned, as provided by section 41, being made by section 42 so liable.

A similar question arose in *Nassau Steam Press* v. *Tyler* (1894), 70 L.T.N.S. 376. The defendants, who were directors of a limited company, the registered name of which was "The Bastille Syndicate, Limited," accepted on behalf of the company two bills of exchange, the acceptance being stated on the bills to be on behalf of "Old Paris and Bastille Syndicate, Limited," and though not so stated in the report, it would appear from what is said by Mathew, J., to have been drawn on the company by that name. They were held personally liable under the provisions of the Companies Act of 1852, which were applied in *Atkin & Co.* v. *Wardle*, because the name of the company as inserted in the bill of exchange was not the correct name of the company. Mathew, J., in delivering judgment, said that the language of sections 41 and 42 was perfectly distinct, and that the statute had not been complied with; and Cave, J., agreed in that opinion.

In a case decided by the Supreme Court of the United States, *Burrow-Giles Lithographic Co.* v. *Sarony* (1883), 111 U.S. 53, a more liberal view was taken of the requirement of a copyright Act that notice of a copyright in a photograph should be given by inscribing upon it in some visible place, among other things, the name of the proprietor. The notice on the photograph in question was in these words: "Copyright, 1882, by N. Sarony." It was objected that the name of the proprietor being Napoleon Sarony, the Act had not been complied with, but it was held otherwise, and, in delivering the opinion of the Court, Mr. Justice Miller said: "With regard to this latter question, it is enough to say, that the object of the statute is to give notice of the copyright to the public, by placing upon each copy, in some visible shape, the name of the author, the existence of the claim of exclusive right, and the date at which this right was obtained. This notice is sufficiently given by

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the words 'Copyright, 1882, by N. Sarony,' found on each copy of the photograph. It clearly shews that a copyright is asserted, the date of which is 1882, and if the name 'Sarony' alone was used it would be a sufficient designation of the author until it is shewn that there is some other Sarony. When, in addition to this, the initial letter of the Christian name Napoleon is also given, the notice is complete."

All that it was necessary to decide in that case was that the use of the initial of the Christian name was a sufficient compliance with the statute, and that would be so, I do not doubt, under the Act which is in question in this case; but the principle of the decision goes further than that, and seems to me to be in conflict with that upon which the English cases to which I have referred were decided.

I may point out that in the only Ontario case in which this question of name appears to have arisen, under the Conditional Sales Act, it was assumed, though the point was not discussed, that the use of the initials or recognized abbreviations of Christian names sufficed: *Wettlaufer* v. *Scott*, 20 A.R. 652.

It was, however, argued on behalf of the respondent that the Act did not apply.

The provisions of the agreement material to this inquiry are:

(1) The acknowledgment of the receipt by Thody from the respondents of the piano and a stool and drape, the value of which is stated to be $300.

(2) That they are received on hire for forty-three months at $7 per month, payable in advance.

(3) That the $300 are to be paid by Thody in the event of the piano being injured, destroyed, or not being returned to the respondents on demand in good order, reasonable wear and tear excepted.

(4) That it is agreed that Thody may purchase the piano, stool and drape for $300, payable in instalments of $25 per three months from date until the whole is paid with interest.

(5) But that until the whole purchase money and interest be paid, the piano, stool and drape shall remain the property of the respondents on hire by Thody, and shall not be removed from the premises at which they were then delivered without the written consent of the respondents.

(6) That in default of payment of any instalment of the purchase money or of the monthly rental, or in case the piano should be removed or any attempt made or threatened to move it from the premises mentioned without the necessary consent being given, the respondents might resume possession of the property, the agreement for sale being declared to be conditional and punctual payment essential to it.

(7) That if possession should be resumed, all instalments of rent to the date of possession being taken should be forthwith paid by Thody to the respondents, together with the damages which the piano might have sustained beyond ordinary wear and tear, and certain expenses, but that any sum received on account of purchase money beyond the rent due and the costs and expenses should be returned to Thody.

(8) That on payment in full of the purchase money and interest, no rent or hire was to be charged to Thody.

It will be seen from this synopsis of the agreement that the contract is one of hiring only, with the option to Thody of purchasing for $300, and that in the event of his electing to purchase, and paying the purchase money and interest in full, he is to be charged no rent—which may mean that he is thereafter to be charged no rent, or possibly that any payments of rent which shall have been made are to be credited on the purchase money, and no further payments of rent are to be exacted.

Thody does not appear to have elected to purchase, and therefore was never in possession of the piano under a contract of purchase, but always as the hirer of it for the unexpired portion of the forty-three months at the rent mentioned in the agreement.

Helby v. *Matthews*, [1895] A.C. 471, is relied on by the respondents as supporting their contention that the Act does not apply. In that case the question arose on section 9 of the Factors Act, 1889, which enables one who has bought or agreed to buy goods, and has with the consent of the seller obtained possession of the goods or of the documents of title to them to defeat the lien or other right of the seller in respect of the goods by the delivery or transfer of the goods or documents of title under any sale, pledge or other disposition of them or

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under any agreement for sale, pledge, or other disposition thereof to a person receiving the same in good faith and without notice of the lien or other right of the original seller in respect of the goods.

The article in question was, as in this case, a piano which the appellants had delivered to one Brewster, who had pledged it to the respondent. Brewster was put in possession of the piano by the appellant under an agreement substantially the same as that under which Thody received the piano in question in this case, except that the agreement provided that Brewster might at any time terminate the hiring by delivering up to the owner the piano, and was not bound to pay the thirty-six monthly instalments; that if Brewster punctually paid £18 18s. in thirty-six monthly instalments of 10s. 6d. each, which was the amount of the monthly rent, the piano should become his sole and absolute property, and there was no fixed term for the hiring.

The sole question to be decided was whether the respondent had made out that Brewster had bought or agreed to buy the piano within the meaning of section 9 of the Factors Act, 1889, and it was decided that he had not. The ground upon which the decision proceeded was that though the appellant was bound to sell if Brewster elected to buy, the latter was not bound to buy, but was entitled at any time if he saw fit to do so to terminate the hiring by giving up the piano, though if he retained it for the thirty-six months and paid the monthly rent for that period, at the expiration of it he would become the owner and would have paid the full price, and it was pointed out that if Brewster had been bound to pay the thirty-six monthly instalments of rent, the decision must have been the other way, for in that case there would have been, as put by Lord Shand (p. 483), "an absolute obligation or agreement by Brewster to acquire the instrument in property, and by purchase, although the instalments were described as for rent or hire, and the case of *Lee* v. *Butler*, [1893] 2 Q.B 318, would have directly applied."

It will be observed that though under the agreement in the present case Thody is bound to pay the agreed rent for forty-three months, and there is therefore an element in it which

was wanting in *Helby* v. *Matthews*, the aggregate of these payments is but $301, while if the option to purchase were exercised, the sum which Thody would be required to pay in order to become the purchaser would be $300, and the interest at seven per cent. per annum for the three years over which the payments were to extend (considerably more than $301), and the whole price is required to be paid in thirty-six months from the date of the agreement, instead of being, as the rent is, spread over a period of forty-two months (the payments being required to be made in advance), so that the rights of the parties under the agreement, as it seems to me, are to be determined according to the principle applied in *Helby* v. *Matthews*, rather than that upon which *Lee* v. *Butler* was decided. The distinction may appear to be a fine one, but it appears to me to be substantial.

There remains to be considered how far, if at all, the decision in *Helby* v. *Matthews* governs the application of the Conditional Sales Act to the agreement in this case.

Section 1 applies to "receipt notes, hire receipts, and orders for chattels given by bailees of chattels, where the condition of the bailment is such that the possession of the chattel passes without any ownership therein being acquired by the bailee until the payment of the purchase or consideration money or some stipulated part thereof," and declares that they shall "only be valid as against subsequent purchasers or mortgagees without notice in good faith for valuable consideration if the requirements of the Act are complied with."

No definition of a receipt note or of a hire receipt is given, probably because it was thought that each had a well understood meaning. It is reasonably clear, however, I think, that the words referring to the condition of the bailment apply to and qualify all the instruments with which the section deals.

If this be so, the section does not apply unless the instrument is one by which the person into whose possession the chattel passes agrees to become the purchaser of it, but the ownership of it is not to be acquired by him until he has paid the purchase or consideration money or some stipulated part of it—in other words, unless he has bought or agreed to buy the

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chattel—and therefore the Act does not apply to the case of a mere hiring of chattels, nor, according to *Helby* v. *Matthews*, to the case of a hiring, with an option to the hirer to buy, which, as I have already said, was in my opinion the position of Thody in respect to the piano in question.

This view appears to me to be supported by other provisions of the Act, particularly sections 2, 5, 6 and 8, and the title of the Act.

The language of section 2, which provides for the filing of the instrument, is receipt note, hire receipt, order or other instrument, evidencing the bailment or conditional sale *given to secure the purchase money or a part thereof.*

Section 5 requires that a copy of the receipt note, hire receipt, order or other instrument by which a lien on a chattel is retained or which provides for a conditional sale, be left with the bailee or conditional vendee.

Section 6 provides that the information to be supplied by the manufacturer, bailor or vendor, is to be as to the amount due or unpaid on the goods or chattels, and the terms of payment of it, and not as one would expect if the Act was intended to have the wider application I have referred to, to give that information, and information as to the nature of the agreement, if any, between him and the person in possession.

Section 8 gives the right to redeem on payment of the full amount then in arrear, with interest and costs and expenses.

And the title of the Act is "An Act respecting Conditional Sales of Chattels."

I have come to this conclusion as to the proper construction to be given to the Act with some diffidence, because of the exceptionally faulty character of its draughting, which renders it well-nigh impossible for any one to say with any degree of certainty what the language employed by the Legislature to express its will really means.

Upon the whole, in my opinion, the judgment in favour of the respondents is right and ought to be affirmed, and the appeal from it dismissed with costs.

FERGUSON, J:—I concur in this judgment.

*Appeal dismissed.**

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*An application to the Court of Appeal for leave to appeal to that Court was on the 15th of September, 1902, refused, chiefly on the ground of the small amount involved.—Rep.

R. S. C.

[DIVISIONAL COURT.]

THE PEOPLE'S BUILDING AND LOAN ASSOCIATION

v.

STANLEY.

D. C.
1902
Sept. 8.

Execution—Motion for Leave to Appeal—Costs of—High Court Authority to Issue Execution.

THIS was an appeal by the defendant from the judgment of Meredith, J., reported *ante* p. 247.

The appeal was heard before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., and STREET, J., on September 8th, 1902.

W. H. Bartram, for the appeal.
Dyce Saunders, contra.

At the conclusion of the argument on behalf of the defendant, the Court held that the learned Judge had power to make the order, and dismissed the appeal with costs.

G. A. B.

[MACLENNAN, J.A.]

1902
July 2.

IN RE LENNOX PROVINCIAL ELECTION.

Recount of Votes—Marking of Ballot Papers—Identification of Voters—R.S.O. 1897, ch. 9, secs. 112 (4), 124, 126.

A county court Judge is not confined on a recount to the consideration of cases in which an objection was made before the deputy returning officer when counting the votes at the close of the poll.

A ballot marked with a cross outside, but near, the upper line of the top division :—

Held, good. It is not essential to have such a line on a ballot paper at all. Similarly all votes below the lower division must be counted for the candidate whose name is in it.

Where a ballot was marked with a circle, not a cross, or any apparent attempt to make a cross :—

Held, bad.

Where a ballot was well-marked for one candidate, but in the other candidate's division there was an irregular, shapeless pencil mark, which was not, however, a cross or any attempt to make a cross, nor a mark by which the voter could be identified :—

Held, a good vote for the candidate for whom the paper was well marked.

A ballot, though well marked, had in the same division the initials S.A. in small but legible capitals :—

Held, bad. Any written word or name upon a ballot, presumably written by the voter, ought to vitiate the vote, as being a means by which he may be identified.

Ballot papers had a cross or crosses in the divisions of both candidates :—

Held, bad.

THIS was an appeal by both candidates from a recount of ballots by the county Judge on the election of a member of the Legislative Assembly of Ontario for the electoral district of Lennox, held May 22nd and 29th, 1902.

The points arising for decision are stated in the judgment of MACLENNAN, J.A., before whom the matter was argued on June 21st, 1902.

S. H. Blake, K.C., *W. D. McPherson*, and *E. G. Porter*, for Carscallen.

G. H. Watson, K.C., and *J. Grayson Smith*, for Madole.

The following cases were cited on the argument: *South Wentworth* case (1879), H.E.C. 531, 533-5; *West Elgin* case (1898), 2 E.C. 38, 40; *West Huron* (1898), *ib.* 58, 62; *Jenkins* v. *Brecken* (1883), 7 S.C.R. 247, 265; *Berwick-upon-Tweed* case (1880), 3 O'M. & H. 178, 182; *Cirencester* case,

Day's Elec. Cas. 53; *Russell Election* case *(2)* (1879), H.E.C. 521; *In re King's County Dominion Election* (1900), 21 C.L.T. 57; *Monck* case (1874), H.E.C. 725, 733; *Bothwell* case (1884), 8 S.C.R. 676, 696; Ontario Election Act, R.S.O. 1897, ch. 9, secs. 69 (2), 93, 96, 112 (3) (4), 124.

July 2. MACLENNAN, J.A.:—Appeal from a recount of ballots by the county Judge, who found the votes cast for the two candidates, T. G Carscallen and M. S. Madole, to be equal. Carscallen appeals in respect of seven ballots—Nos. 405, 4032, 4004, 5288, 2470, 4064, and 5256; and Madole appeals generally, without specifying in his notice any particular ballots. It was arranged that Carscallen's appeal should first be heard and disposed of, and that Madole's appeal should be taken up afterwards. The present judgment concerns the subject of Carscallen's appeal.

A preliminary question was raised which must first be considered. It was argued that the learned Judge was confined on the recount to the consideration of cases in respect of which an objection was made before the deputy returning officer when counting the votes at the close of the poll. This objection was probably suggested by the query in *Jenkins* v. *Brecken*, 7 S.C.R. 247, a decision upon the Ballot Act, 1874, 37 Vict. ch. 9 (D.), which made no provision for a recount, otherwise than upon a scrutiny. In support of this contention, sec. 112 (4) of the Ontario Election Act, R.S.O. 1897, ch. 9, was cited. That sub-section directs the deputy returning officer to take a note in a prescribed form of any objection made to any ballot found in the ballot box, and to decide any question arising out of the objection; and declares that his decision is to be final, subject only to reversal on a recount by the county court Judge on petition questioning the election or return. Section 124 was also cited as supporting that contention. I am, however, clearly of opinion that there is nothing in the contention. What sec. 112 (4) says is that the decision of the deputy returning officer is subject to reversal, not on appeal to the county Judge but on a *recount*. And sec. 124 (1) says that the county Judge is to appoint a time, and give notice of a time

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and place at which he will proceed to recount *the votes.* This is the expression which is used in several other sub-sections of sec. 124; and, finally, sec. 126 directs that at the time and place appointed, the county Judge shall proceed to recount *all the votes* or *ballot papers* returned by the several deputy returning officers. All this makes it clear that the county Judge is not confined on the recount to an examination of the ballots to which objection was made before the deputy returning officer, and I therefore overrule the objection.

The ballot papers used at this election are in the form prescribed by the statute, having two divisions for the names of the candidates, separated by a line from left to right, and also having a line above the upper division, and one below the lower division, parallel to the dividing line. Outside of these last mentioned lines there is a margin about half an inch wide.

The first ballot discussed was No. 405, which was marked with a cross outside, but near, the upper line or boundary of Carscallen's division, and was rejected. I think it should be allowed. I think a ballot like this, marked above the upper line, is good. That line is not essential, and the form of ballot given by the Act is directory. A ballot without the line would be good. The North Grey ballots used in this election have no line at the top or bottom of the ballot. The line between the two names would be sufficient, there being only two candidates. All that is above the first name may be regarded as a part of the division of the first candidate, and all below the second name as a part of the division of the other candidate. In the *West Elgin* case, 2 E.C. 41, I held that the upright lines separating the numbers from the names were not essential. The present case is not so strong, but I think the same principle may be applied in order to uphold what I cannot help thinking was intended to be a vote for Carscallen.

Mr. Watson cited an unreported decision of the Chancellor and Street, J., in the *North Bruce* case (Dominion Election), in 1901, in which a number of ballots marked above the upper line were disallowed. I have conferred with my brother Street, and find that the decision proceeded on the express direction of sec. 72 of the Dominion Elections Act, 1900, 63-64 Vict. ch. 12, which expressly directs the cross to be made with a black pencil on

the white space containing the name of the candidate. Looking at the form of ballot prescribed by that Act, the language of sec. 72 left no room to contend for the validity of crosses marked not in the white space but in the dark space above.

No. 4032 is marked in the proper place for Madole, but the mark is a circle, not a cross, or any apparent attempt to make a cross. I think the requirement of the statute must be followed, so far as to require some visible attempt to make a cross. With every desire to find some such attempt in this case, I have been unable to do so, and I think the vote must be disallowed.

No. 4004 is well marked for Carscallen, but was disallowed because of an irregular, shapeless pencil mark in Madole's division. This had been disallowed, but I think it should be counted for Carscallen. The mark is not a cross or any attempt to make a cross, nor is it a mark by which the voter could be identified, and so I do not think the vote ought thereby to be held bad.

No. 5288 was also distinctly marked by a cross for Carscallen. It had, however, in Carscallen's division, in the sub-division containing his number, the initials S.A. in small but legible capitals. This was allowed for Carscallen by the deputy returning officer, but rejected by the Judge. In the *West Huron* case (1898), 2 E.C. 58, at p. 62, and the *West Elgin* case (1898), *ib.* 38 at pp. 44-5, respectively, Mr. Justice Osler and myself decided cases of ballots having writing upon them differently, and I have thought it right to confer with him before deciding this case. The result is that after considering all the reported cases on the subject, both here and in England, we are both of opinion that any written word or name upon a ballot, presumably written by the voter, ought to vitiate the vote, as being a means by which he could be identified. We also think that in general other marks ought not to have that effect, without deciding that particular cases may not arise in which it ought to be held otherwise. It follows that while No. 4004 ought to be allowed for Mr. Carscallen, No. 5288 was rightly rejected by the learned county Judge.

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I think No. 2470, which was marked by a somewhat irregular cross for Mr. Madole, was rightly allowed; and that Nos. 4064 and 5256, having a cross or crosses in the divisions of both candidates, were properly rejected. It was contended that in No. 5256 there were indications of an intention to obliterate the cross in Madole's division. I do not think I could fairly come to that conclusion.

The result so far is that Nos. 405 and 4004 should be added to Mr. Carscallen's poll, and No. 4032 should be struck off the poll of Mr. Madole, which gives Mr. Carscallen a majority of three.

A. H. F. L.

[FALCONBRIDGE, C.J.K.B.]

TOWN V. ARCHER ET AL.

1902
May 26.

Medicine and Surgery—Malpractice—Limitation of Actions—Ontario Medical Act—Termination of Services—Trial—Dispensing with Jury—Finding of Court on Evidence.

An action against surgeons for malpractice was held to be barred by sec. 41 of the Ontario Medical Act, R.S.O. 1897, ch. 176, not having been commenced within one year from the date when, in the matter complained of, the defendants' professional services terminated, although the plaintiff had twice visited the defendants at their offices within the year, the Court finding that on these occasions she did not go as a patient, but as a person with a grievance, she having previously consulted another surgeon, and also a solicitor.

Actions of malpractice are now more properly tried without a jury.

Upon the evidence, it was held, also, that the plaintiff, upon whom the burden rested, had failed to make out a case of negligent malpractice; and the action was dismissed.

THIS was an action for malpractice, tried at the Toronto non-jury sittings on the 18th and following days of February, 1892, before FALCONBRIDGE, C.J.K.B., without a jury.

N. F. Paterson, K.C., and *S. S. Sharpe*, for the plaintiff.

A. B. Aylesworth, K.C., *J. H. Moss*, and *W. H. Harris*, for the defendants.

May 26. FALCONBRIDGE, C.J.:—This is an action brought by the plaintiff, who is the wife of a farmer residing in the county of Ontario, against the defendants, who are physicians and surgeons residing and practising, in partnership, at the village of Port Perry, in the same county.

In the month of May, 1899, the plaintiff fell and sustained injuries in her left ankle and foot, and the defendants were retained as surgeons, for reward in that behalf, for the purpose of treating the plaintiff for such injuries.

The plaintiff charges that the defendants negligently, improperly, and unskilfully, treated the plaintiff for such injuries; in consequence whereof the plaintiff has been suffering, and still suffers, pain, and her foot has become distorted and twisted so that she has been rendered permanently lame; and her health has become otherwise impaired thereby.

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The defendants plead, in their statement of defence, that they are both duly registered members of the College of Physicians and Surgeons of Ontario; that the defendants were not retained to treat the plaintiff, as alleged, but that the defendant D. Archer was called in after the accident to the plaintiff, as a surgeon to set the plaintiff's ankle, and, with the assistance of another surgeon, did set the same in a proper and skilful manner; and that the said defendant D. Archer was thereupon discharged by the plaintiff from any further attendance in the case. They also plead that the injury complained of by the plaintiff was not caused by any negligence of the defendants, or either of them, but is due solely to the negligent manner in which the plaintiff's injuries were treated by herself, subsequently to the treatment of her ankle by the defendant D. Archer. And the defendants further set up as a defence, that the plaintiff's ankle was set by the defendant D. Archer more than a year before the commencement of this action; and that the plaintiff's claim, if any, is barred by R.S.O. 1897, ch. 176, sec. 41.

The case was tried before me on the 18th, 19th, 20th, and 21st February last, and argued on the 27th of the same month. I have deferred judgment until now, not because I had any doubt as to what the disposition of the issues ought to be, but because the importance of the case to the medical profession, and to the community at large, seems to require that I should make a more formal and deliberate deliverance of my opinion than would be conveyed by an off-hand judgment pronounced at the trial.

The condition of the plaintiff, who is a woman of sixty years of age, at the time of the trial, is fully set out in the report of the surgeon appointed by order of the Court to make a physical examination. It is as follows:

"Report on the physical examination of Mrs. Narcissa A. Town, of Saintfield, Ont.

"She states that she sustained an injury of the left ankle on May 17th, 1899. Examination by order of the Court, Sept. 28th, 1901. Condition on examination:

Length of tibia, same on both sides.

Length of fibula, same on both sides.

Circumference of the left leg, 1 inch less in calf than that of right.

Circumference above knee, equal.

The distance from the external malleolus to the ground is increased, and that from the internal to the ground slightly diminished. This causes the foot to be turned inwards, so that in the erect position the left side of the sole of the foot reaches the ground, while the inner side is raised about an inch. This is more marked at the toe than at the heel.

There is a marked prominence of bony character in front and to the outer side of the ankle-joint. This is clearly the head of the astragalus. The body of the astragalus can be felt distinctly behind this, somewhat in front, and to the outer side of its normal position.

The patient complains of pain on pressure over this part and also at the inner side of the foot below the malleolus (ankle).

There is but little thickening of the soft parts.

No other injuries are present.

Conclusions:

(1) There has been, and still is, a dislocation of the astragalus, forwards and outwards.

(2) There is no sign at present of there ever having been fracture either of the tibia or fibula.

(3) Result: the pain will perhaps become less on using the foot, and the displaced parts will gradually become accustomed to their altered relations; but the deformity resulting from the dislocation will be permanent."

(signed) "George A. Peters, M.B., F.R.C.S., Eng."

The question then for trial is, whether the condition of the plaintiff to-day is due to the want of care and skill of the defendants; or, (2) whether the plaintiff's own want of care has resulted in the injury, or whether she has by her own conduct aggravated her injuries; or, (3) whether her present condition is a result which might reasonably be looked for, and which has come to pass, having regard to her age and to the nature of the injury, even with the best degree of care and skill of a medical attendant, and the best degree of care and obedience to the doctor's orders on the part of the patient and of those in attendance on her in her own household.

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Although I consider it due to all the parties concerned, to pass upon the merits of the case, yet I am bound to give an opinion upon the defence which has been raised under the statute, of the limitation of the action by reason of the lapse of time. The statute R.S.O. 1897, ch. 176 (the Ontario Medical Act), sec. 41, is as follows: "No duly registered member of the College of Physicians and Surgeons of Ontario, shall be liable to any action for negligence or malpractice, by reason of professional services requested or rendered, unless such action be commenced within one year from the date when in the matter complained of such professional services terminated."

The writ herein was issued on the 21st day of December, 1900. If, therefore, the defendants' professional services continued up to the 21st day of December, 1899, the statute is not a good defence. The defendants contend that their professional services terminated with the visit of the 12th June, 1899, and that any visits paid by them after that date were friendly visits and not professional ones. The plaintiff contends that she called, as a patient, on the defendants at their office on the 21st December, 1899, and on the 11th January, 1900; and that the defendants' professional services did not terminate until the last mentioned date. There is a conflict of testimony between the plaintiff and defendants as to the real date of the last visit but one; the defendants contending that it was not on the 21st December, but on the 21st November, and backing up their statement by evidence of their different professional engagements and journeys on that day, and on the day preceding. However that may be, I am decidedly of opinion that when the plaintiff went to see the defendants on the last two occasions she did not go as continuing the relation of patient and medical man, but as a person who had a grievance and who was dealing with the defendants more or less at arms' length. She had called in another doctor (Parke of Saintfield) to look at the foot, on the 13th December, 1899; and she consulted a solicitor during the same month. Consulting another surgeon, in the absence of, and without notice to or leave of, the surgeon in charge, is an indication of want of confidence in the latter, and would of course be treated by him, when he came to know of it, as tantamount to a dismissal of him by the

patient. I am clearly, therefore, of the opinion that the defendants can claim the benefit of the statute and that on this ground alone the action fails.

But, as I said before, I deem it incumbent upon me to dispose of the other issues in the case.

The defendants are practising in partnership, but David Archer was the partner who was in charge of the case, and it is his alleged negligence which is in question here. But where physicians or surgeons engage in practice as partners all are liable for malpractice by any member of a firm.

Malpractice (mala praxis) is bad or unskilful practice by a physician or surgeon, whereby the health of the patient is injured. Negligent malpractice means gross negligence and lack of the attention which the situation of the patient requires; as if a physician while in the state of intoxication should administer improper medicines: that is not charged here, but what is charged is ignorant malpractice, namely, a course of treatment which was calculated to do injury, which has done harm, and which a well educated and scientific surgeon ought to know was not proper in the case.

In 1697 the Court of King's Bench (*temp.* Chief Justice Holt) resolved in *Doctor Groenvelt's Case*, which Lord Raymond reports at p. 214 in the quaint language of the day, "That mala praxis is a great misdemeanour and offence at common law (whether it be for curiosity and experiment or by neglect) because it breaks the trust which the party has placed in the physician, tending directly to his destruction."

The burthen of proof is upon the plaintiff in an action of this character, to shew that there was a want of due care, skill, and diligence on the part of the defendant, and also that the injury was the result of such want of care, skill, and diligence. The general rule of skill required of a medical practitioner was thus ably summed up by Erle, C.J., in *Rich* v. *Pierpont* (1862), 3 F. & F. 35, at p. 40: "A medical man was certainly not answerable merely because some other practitioner might possibly have shewn greater skill and knowledge; but he was bound to have that degree of skill which could not be defined, but which, in the opinion of the jury, was a competent degree of skill and knowledge. What that was the jury were

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to judge. It was not enough to make the defendant liable that some medical men, of far greater experience or ability, might have used a greater degree of skill, nor that even he might possibly have used some greater degree of care. The question was whether there had been a want of competent care and skill to such an extent as to lead to the bad result."

Tindal, C. J., in *Lanphier* v. *Phipos* (1838), 8 C. & P. 475, at p. 479, charged the jury in the following clear and succinct terms: "What you will have to say is this, whether you are satisfied that the injury sustained is attributable to the want of a reasonable and proper degree of care and skill in the defendant's treatment. Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable, and competent degree of skill, and you will say whether, in this case, the injury was occasioned by the want of such skill in the defendant."

It has been held in some American cases that the locality in which a medical man practises is to be taken into account, and that a man practising in a small village or rural district is not to be expected to exercise the high degree of skill of one having the opportunities afforded by a large city; and that he is bound to exercise the average degree of skill possessed by the profession in such localities generally. I should hesitate to lay down the law in that way: all the men practising in a given locality might be equally ignorant and behind the times, and regard must be had to the present advanced state of the profession and to the easy means of communication with, and access to, the large centres of education and science. For example; Port Perry is a two hours' journey from a city of a quarter of a million inhabitants, with three medical colleges and numerous hospitals.

There is no implied warranty on the part of a physician or surgeon that he will effect a cure. He can be treated as an

insurer or guarantor of success, only if there be an express agreement to that effect.

If a surgeon treat a patient improperly, he is liable to an action even though he undertook *gratis* to attend to the patient.

If a patient by his own conduct, or disobedience of orders, has aggravated his injuries to an extent that will account for the mischief complained of, he cannot recover damages from the medical man, having regard to the general law of contributory negligence. The burthen of proof to shew contributory negligence is, of course, on the defendant in an action for malpractice.

The failure on the part of a medical man to give a patient proper instructions as to the care and use of an injured limb is negligence for which the medical man is liable for injury resulting therefrom.

These are the principal propositions of law involved in the consideration of the present case.

In addition to the cases cited above, I refer to *Slater* v. *Baker* (1767), 2 Wils. 359; *Carpenter* v. *Blake* (1871), 60 Barb. 488; *S. C.* (1872), 50 N. Y. 696; Beven on Negligence, 2nd ed., p. 1390 et seq.; Smith on Negligence, Blackstone ed., * p. 195 et seq.; American & English Encyc. of Law, 1st ed., vol. 14, p. 76 et seq.; Bouvier's Law Dictionary, sub tit. Physician.

Actions of this kind were, as a matter of course, formerly tried, both here and in England, by a jury; and it was the almost inevitable result that juries, perhaps innocently and unconsciously, looked more favourably upon the case presented by the patient than on that presented by the physician or surgeon. To remedy this condition of affairs, and not to leave doctors entirely at the mercy of juries, the courts in this country early became astute to lay down limitations and restrictions on the actions of the twelve; or, rather as to what matters ought to be left to them to deal with. For example, in 1869 the Court of Queen's Bench held in *Jackson* v. *Hyde*, 28 U. C. R. 294, that in an action against a surgeon for negligent malpractice, where the evidence is as consistent with the absence as with the existence of negligence, the case should not be left to the jury.

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In *Fields* v. *Rutherford* (1878), 29 C. P. 113, although there was professional evidence that a different course of treatment might preferably have been pursued, but the weight of evidence shewed that the course of treatment pursued by the defendant was such as would have been adopted by medical men of competent skill and good standing in the profession, it was held that there was no evidence of negligence to be submitted to the jury, and a nonsuit was entered. These cases were followed in *McQuay* v. *Eastwood* (1886), 12 O. R. 402. The *ratio decidendi* of these cases was, that a medical man ought not to be placed in peril with a jury where their decision would involve the consideration of difficult questions in the region of scientific inquiry.

The next step in the practice was the suggestion by the courts that this class of cases ought more properly to be tried by a Judge without a jury. This was the corollary or natural logical sequence of the cases which I have cited, and was first made in *Kempffer* v. *Conerty* (1901), 2 O. L. R. 658 (note); and the same intimation was given in *McNulty* v. *Morris* (1901), 2 O. L. R. 656. In both these cases it was stated in the judgment that this intimation was not intended to fetter the discretion of the trial Judge in this regard. And so it comes about that this case is tried by me without a jury, the parties having practically consented to my so doing.

The injury which the plaintiff sustained, namely, dislocation of the astragalus, is one which is admittedly not of frequent occurrence; difficult to diagnose, especially when there is swelling of the parts; and one in which perfect restoration is not, at the plaintiff's time of life, to be expected. I was strongly pressed by counsel in the argument, to find as a fact that David Archer and Dr. Windell did not make a correct diagnosis, or recognize the dislocation of the astragalus at all. Much stress was laid upon the somewhat different accounts given by these two, of the extent and position of the alleged fracture of the fibula. I think that the comments on this subject were somewhat hypercritical; and I fail to see their cogency in this regard. Technically speaking, the breaking or carrying away of any portion of the periosteum constitutes a fracture; and I find, on the preponderance of the evidence, that

such a fracture cannot be expected to be disclosed after the lapse of two years, by the aid of the X ray, or sciagraph. The sciagraph is not a photograph; it is a shadow; and it is, in the present state of the science, not an infallible guide in fractures; to this extent at least, that it will not always disclose the line of fracture; and the possibility is that the bony covering being reunited might not shew at all. I, therefore, attach much less importance to what is now claimed to be shewn by the sciagraph than the plaintiff's counsel wishes me to do. On the whole case, and having regard to the burthen of proof, I find myself unable to determine this point in plaintiff's favour.

The next point in the case is, assuming the diagnosis to have been correct, whether the treatment adopted was in accordance with good surgery. Two medical men were called to say that it was not. Having already been examined as witnesses, they were recalled at the very end of the plaintiff's case to criticize the treatment that was adopted. One of them was, apparently, a very respectable country practitioner of eighteen years standing; the other was the gentleman who produced the sciagraph and gave evidence based thereon. These two witnesses found fault with the treatment in this respect, that, in their opinion, the particular injury in question having been diagnosed, a bandage should have been applied with some form of angular splint before putting the leg in a box; and they said that the treatment actually adopted, namely, the wooden box splint with cotton batting packed about the limb, and a bandage outside the box, was not good surgery. I find that this position is not sustained by the preponderance of expert evidence. Dr. George A. Bingham says that what the defendant did was good surgery, and that the treatment suggested by the two witnesses of whom I have spoken would be practically "criminal." Mr. I. H. Cameron is equally pointed and incisive in his statement; he says that the box splint is quite good practice, and that the bandage next the skin and the rest of the treatment suggested by plaintiff's witnesses "would be the most undesirable that could be conceived." Dr. Herbert A. Bruce says that the splint box and bandaging adopted were perfectly suitable, and that the angular splint and the bandage next the skin would be very detrimental.

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To what then, if I find, as I am bound to do upon the preponderance of evidence, that the case was properly diagnosed and that the proper treatment was adopted, is the present unfortunate result to be attributed? If it came down to a question between negligence or malpractice on the part of defendants, on the one hand, and the extreme improbability, even under favourable conditions, of perfect or even approximate restoration, I think the doctor in charge ought to have the benefit of the doubt.

But I am of the opinion that there is abundant evidence to shew that the present condition of the plaintiff is due to her own conduct.

I may premise by saying that it is clearly proven that it is impossible to say now whether the present dislocation is initial, or is a dislocation subsequent to the injury of the 17th May, and the setting or reduction thereof on the same day. It is further to be observed that Mr. Cameron says that the X rays shew that the astragalus is still in its mortise; *i.e.*, in place as regards the tibia and fibula, but that there is a rotation of the joint, and a displacement of the head of the astragalus outwards. I understood Dr. Bruce to say that that condition of affairs was evidence that there had been a reduction of the original dislocation. Be this as it may, Dr. Windell swears that having dignosed and set and reduced the injury with David Archer on the 17th May, he visited the patient on the 19th May and found her condition satisfactory, and again on the 22nd; he paid a visit on the 3rd June, alone, and found that the bandages had been disturbed, and he asked her about it, and she admitted that she had had the bandages loosened and had a nice sleep. That he then found a partial dislocation of the astragalus and that he replaced it, put the limb back in the splint, and repacked it; that he could not tell what was the extent of that dislocation, but that he does not think that there was any dislocation except at the head. He attributes this partial dislocation to her having fallen asleep and turned over. The three medical experts called by the defence agree in saying that there was very grave danger in a box splint if the patient relaxed the bandages; that it would be impossible to say that there was no disturbance, even if the

patient lay perfectly still; that there would be room for spasmodic action of the muscles which might occur involuntarily or during sleep, and which might be attended with grave results; that it would not be possible, even with an effort, to keep the limb rigid for more than a minute or two; and, moreover, that the result of this disturbance might not be discernible until after the patient began to use the foot, when a gradual inversion of the foot might be looked for as the patient commenced to walk.

I am asked to disbelieve the statement of Dr. Windell, upon the mere ground that, while he is not a defendant in the case, his professional reputation is at stake. I find myself unable to do this, especially as his evidence is strongly corroborated. The plaintiff admits having gone to sleep once, while the bandage was loosened; this, however, was after the leg was placed in the plaster of paris splint and cut open on the 12th June; but Mrs. Asling, an apparently independent and credible witness, says that she went in one time and the bandage was loose, and the plaintiff was working at the cotton batting, and witness asked plaintiff not to do it, and cited the case of a relative of her own whose tampering with bandages had been attended with disastrous results. Witness saw it loose on one other occasion afterwards. Both these times were while it was in the box splint; it was unbound when the witness came in, and she helped the plaintiff to do it up. She says Mrs. Gibson was there on that last occasion. Mrs. Asling also says that she saw the plaster of paris bandages taken off, and the leg was laid bare, and the plaintiff wanted the witness to get it done up in a hurry before Mrs. Baird, the plaintiff's daughter, should come in. Mrs. Gibson corroborates this statement, saying that she was at the plaintiff's house with Mrs. Asling one evening that the bandage was loose, and it was bound up while she was there. As far as she can remember, it was while in the box splint; it was right out of the splint, and that they replaced it in the splint and bound it up in the bandages.

If this evidence were much less clear and convincing than it is, in other words, if the case were much more evenly balanced, I should feel obliged to give the defendants the benefit of the doubt: but, as I have indicated before, I am

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decidedly of opinion that the plaintiff has failed to make out a case of negligent malpractice, and that the action must be dismissed.

T. T. R.

[IN THE COURT OF APPEAL.]

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June 28.

THE ATTORNEY-GENERAL. v. SCULLY

Mandamus—Malicious Prosecution—Record of Acquittal—Clerk of the Peace—Fiat of Attorney-General.

The books, indictments and records of the court of general sessions, which are in the hands of the clerk of the peace, are public documents which everyone who is interested in has a right to see ; and a defendant who has been tried and acquitted at the sessions is entitled to a copy of the record of acquittal, and it is not necessary to obtain the fiat of the Attorney-General therefor.

ARMOUR, C.J.O., dissenting.

Regina v. *Ivy* (1874), 24 C.P. 78, and *Hewitt* v. *Cane* (1894), 26 O.R. 133, in effect overruled.

Judgment of the Divisional Court, 2 O.L.R. 315, affirmed.

THIS was an appeal by the Attorney-General of the Province of Ontario in the matter of *Rex* v. *Scully*, from the judgment of a Divisional Court, reported 2 O.L.R. 315.

One Cornelius Scully was indicted at the general sessions of the peace at Stratford for stealing forty-one logs and was acquitted. He then applied to the clerk of the peace for the county of Perth for a certified copy of the indictment and indorsements, but not having the fiat of the Attorney-General, his application was refused.

A motion was then made on his behalf before Falconbridge, C.J.K.B., in Chambers, for a prerogative writ of mandamus to the clerk of the peace, which motion was dismissed.

He then appealed to the Divisional Court, who reversed the decision of Falconbridge, C.J., and ordered the writ to issue.

The appeal was argued in the Court of Appeal on the 19th November, 1901, before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS and LISTER, JJ.A.

John R. Cartwright, K.C., Deputy Attorney-General, and *Frank Ford*, for the appeal. The Court below, relying on *Herbert* v. *Ashburner* (1750), 1 Wils. 297; *The King* v. *The Sheriff of Chester* (1819), 1 Chit. R. 476, and *The King* v. *The Justices of Staffordshire* (1837), 6 A. & E. 84, has decided that any one interested has a right *to see* the records, etc., in the hands of the clerk of the peace. We do not dispute that, but those cases go no further. In *The King* v. *The Sheriff of Chester* it was a mere question of inspection, and in *Herbert* v. *Ashburner* a mere question of property. The judgment appealed from also refers to Mr. Graves' note in 3 Russell on Crimes, 4th ed., 350, but passes over the text, which says that "a copy of the indictment cannot be regularly obtained without an order from the Court:" p. 349. There is no distinction between cases at the assizes and at the sessions, but the position of the clerk (of the peace) at the sessions is the stronger one, as he is an independent officer appointed by the Crown, and the Crown in this Province is the *custos rotulorum*. No record of acquittal can be obtained or even made up without the fiat of the Attorney-General: *Regina* v. *Ivy* (1874), 24 C.P. 78; *Hewitt* v. *Cane* (1894), 26 O.R. 133; *Groenvelt* v. *Burrell* (1697), 1 Ld. Raym. 252; *Morrison* v. *Kelly* (1761), 1 Wm. Bl. 385; and 46 Edw. III., which was much discussed in *Preston's* case (1691), 12 How. St. Trials 646, at p. 660, was not overlooked in those cases. Any case shewing a contrary conclusion was where it was desired to prove *autrefois acquit* or *convict*. It is the duty of an officer not to produce without authority: *Legatt* v. *Tollervey* (1811), 14 East 302, 12 Rev. Rep. 518, *per* Lord Ellenborough; *Jordan* v. *Lewis* (1740), there cited and referred to, p. 520; *ib.*, 2 Stra. 1122; Taylor on Evidence, 8th ed., sec. 1490. The *semble* in the headnote in *Browne* v. *Cumming* (1829), 5 Man. & Ry. 118, is not supported by the judgment. *The King* v. *Brangan* (1742), 1 Leach C.C. 27, stands by itself. *The King* v. *Hewes* (1835), 3 A. & E. 725, was a mere application to change a verdict to conform with a jury's finding. We also refer to 1 Tidd's Practice, 8th ed., 647; 3 Lewis' Bl. Com. 126; *Gray* v. *Pentland* (1815), 2 Sergt. & R. (Penn.) 22, at p. 34; *Kelly* v. *Pickett* (1807), 2 Brevard (S. Car.) 144; C.S.U.C. ch. 110.

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Arnoldi, K.C., and *A. M. Panton*, contra. *Regina* v. *Ivey* and *Hewitt* v. *Cane* were mere *obiter dicta*. The position of a prisoner is different from that of an acquitted person. 46 Edw. III. came into force in Canada with the Quebec Act of 1792, and is in force now, and under that statute the right of the respondent to a copy of the indictment is undoubted. The Old Bailey order was passed merely to alter a previous practice, and did not apply to any other Court, and being contrary to 46 Edw. III., was illegal and void. After the prisoner's acquittal his civil right arises to have a copy of the indictments, etc., and the Crown cannot interfere with that right. A *custos rotulorum* in England was appointed by the King to keep the records of the quarter sessions, and was a magistrate, who appointed a clerk as his deputy. Here the clerk of the peace is not a clerk to a magistrate, but holds the records in his custody, as a provincial officer, in the interest of the public and not of the Crown. Even if the Attorney-General is in control of the custody of records of criminal trials at the assizes, he is not in similar control of the records of the general sessions of the peace. The indictments of the general sessions are public documents: *Herbert* v. *Ashburner*, 1 Wils. 297; *The King* v. *The Sheriff of Chester*, 1 Chit. R. 476. The respondent is entitled to have the record made up and to get a copy of it: *The King* v. *The Justices of Middlesex, In re Bowman* (1834), 5 B. & Ad. 1113; *The King* v. *Brangan*, 1 Leach C.C. 27; *The King* v. *Hewes*, 3 A. & E. 725, at p. 732. There is no precedent for the right claimed by the Attorney-General. So far as the Crown formerly used its power arbitrarily, the refusing proof of a record was only an instance of the oppression arising therefrom. No such use of such power has been made within the present memory of Crown officers in England. No proof of the record is now required there: a certificate of the custodian is sufficient: 8 & 9 Vict. ch. 113 (Imp.). We refer also to *Caddy* v. *Barlow* (1827), 1 Man. & Ry. 275, at p. 279 (note); Roscoe's Dig. of Crim. Evidence, 11th ed., 180; Taylor on Evidence, 9th ed., p. 1488; *Miller* v. *Lea* (1898), 25 A.R. 428; Statutes at Large, vol. 10, p. 43 (1786 appendix).

Cartwright, in reply.

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June 28. ARMOUR, C.J.O.:—I am unable to agree with the judgment appealed from, and think that it should be reversed.

The question is as to the right of the Crown to refuse to permit its officers to draw up a record of acquittal of a person charged upon an indictment for felony, to be used in an action for malicious prosecution.

It has been said that such right is founded upon the order made by the Judges, sitting in the sessions in the Old Bailey for London and Middlesex, in 16 Car. 2, "That no copies of any indictment for felony be given without special order upon motion made in open Court, at the general gaol delivery upon motion, for the late frequency of actions against prosecutors (which cannot be without copies of the indictment) deterreth people from prosecuting for the King upon just occasions."

It seems to have been sometimes supposed that this order applied only to indictments at the Old Bailey, but although made by the Judges sitting at the sessions in the Old Bailey, it was of general application.

In *Groenvelt* v. *Burrell*, 1 Ld. Raym. 252, the Court said: "But a man cannot have a copy of a record of a conviction of treason or felony without the leave of the Attorney-General:" p. 253. And Holt, L.C.J., said: "If A. be indicted of felony, and acquitted, and has a mind to bring an action, the Judge will not permit him to have a copy of the record, if there was probable cause of the indictment, and he cannot have a copy without leave:" p. 253.

In *The King* v. *Brangan*, 1 Leach C.C. 27, "At the Old Bailey September session 1742 Patrick Brangan and another were tried for a highway robbery and acquitted. The prosecution appeared to have been brought merely for the purposes of vexation and oppression; and the prisoners' counsel applied to that Court for a copy of the indictment.

"Lord Chief Justice Willes, who tried the prisoners, acknowledged that the prosecution bore the strongest marks of being unfounded and malicious, but refused the application, because it was not necessary that *he* should grant it; declaring, that by the laws of this realm every prisoner, upon his acquittal, had an undoubted right and title to *a copy of the record of such acquittal*, for any use they might think fit to make of it; and

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that after a demand of it had been made, the proper officer might be punished for refusing to make it out."

In a note to this case it is said: "The Court will not grant a copy of the indictment when the acquittal arises from the incompetency of a witness: *Quick's* case, January session, 1784, and see *Beran's* case, January session, 1786."

In *Morrison* v. *Kelly*, 1 Wm. Bl. 384, "At the sittings in Middlesex after Term, this action came on to be tried, being for a malicious prosecution in indicting the plaintiff for keeping a disorderly house. To prove the fact, the clerk of the peace for the Westminster sessions attended with the original record of the acquittal.

"*Norton*, Solicitor-General, objected, that there ought to be a copy of the record granted by the Court, before which the acquittal is had, in order to ground an action for a malicious prosecution. But it was ruled by Lord Mansfield that though this is necessary, where the party is indicted for felony, yet the practice is otherwise in case of misdemesnors."

In *Jordan* v. *Lewis*, 2 Str. 1122, better reported in a note to *Legatt* v. *Tollervey*, 14 East 302, at p. 305; 12 Rev. Rep. 518: "The plaintiff and one Stebbing were indicted at the Old Bailey for forging a promissory note, and acquitted; and the Court ordered Stebbing only to have a copy of his indictment; but Jordan, having also procured a copy of the indictment and acquittal, brought an action against the defendant for a malicious prosecution; and this copy was produced in evidence, etc. It was objected that the copy ought not to be received, because the Judge had refused to grant Jordan a copy of the indictment; and the order that had been made for that purpose at the Old Bailey was produced. But Lee, C.J., who tried the cause, allowed this copy to be given in evidence; and the prosecution appearing to be malicious, the plaintiff recovered £200 damages; but the Chief Justice gave the defendant leave to move for a new trial; which he did but the Court said: This being a copy of the indictment, the Court could not refuse receiving it in evidence; nor could the Court take notice in what manner it was obtained. It was likewise held that to procure a copy, etc., . . could not be considered as a contempt (by the plaintiff) of the Court; and therefore the motion

was denied. But the Chief Justice said that if the defendant had applied sooner, when this action was first brought, the Court would have stayed proceedings. And Chapple, J., said that the defendant might have an action against the officer for giving the plaintiff a copy of the record; for he ought not to have drawn up the copy, etc., that was granted to Stebbing, as if both defendants had been acquitted; but only that Stebbing, who had a copy, etc., allowed him was acquitted. And he said he had known that done *Sed tamen quœre*; for the record is entire." In Mr. Justice Clive's note of the same case, it is said to have been "doubted by the Court, whether the defendant could not maintain an action on the case against the officer who had granted a copy of the indictment contrary to the orders of the Court:" p. 306. However that might be, it seems that such conduct in an officer would be a high contempt of the Court, and punishable accordingly.

In *Legatt* v. *Tollervey*, 14 East 302, 12 Rev. Rep. 578, the action was for malicious prosecution of the plaintiff by the defendant for felony; and at the trial before Heath, J., it was stated by the plaintiff's counsel in opening his case, that a bill of indictment for a felony had been preferred by the defendant against the plaintiff at the quarter sessions of the peace for the county of Sussex, on which the plaintiff was tried and acquitted; and then another bill was preferred for the same offence, which the grand jury did not find; and the plaintiff afterwards called an officer of that Court as a witness, who produced the indictments; but as it did not appear that either the court of quarter sessions or the Attorney-General had authorized a copy of either of the indictments to be given to the plaintiff, the learned Judge would not suffer either to be proved, and nonsuited the plaintiff; relying on a case of *Evans* v. *Phillips* at Monmouth summer assizes, 1763, in which Mr. Baron Adams declared that he should look on the copy of an indictment as surreptitiously taken, and not to be regarded, unless the Court had been applied to and had ordered such copy.

On the argument of the rule for a new trial, Le Blanc, J., observed "that if the officer of the court of quarter sessions had applied to the Judge at *nisi prius*, and stated that he was

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there ready to produce the records, but had no order of the Court to do so, there is no doubt that the Judge would have told him that he was not bound to produce them on the mere application of the party. But it is a different question whether, if offered to be produced in evidence, such evidence was properly rejected for want of an order."

Lord Ellenborough, C.J., in delivering the judgment of the Court, said: "It is very clear that it is the duty of the officer, charged with the custody of the records of the Court, not to produce a record but upon competent authority, which at the Old Bailey is obtained upon application to the Court, pursuant to the order which has long prevailed there; and with respect to the general records of the realm, upon application to the Attorney-General. But if the officer shall, even without authority, have given a copy of a record, or produce the original, and that is properly proved in evidence, I cannot say that such evidence shall not be received. He may incur the penalty of his contempt of the Court, and he may be warned at the time of his peril in so doing: and a discreet officer placed in such a situation would, doubtless, before he produced the record, or gave a copy of it, apply to the Court, and state the circumstances of the case; and it cannot be doubted that he would be saved harmless in doing what, after such disclosure, the Court should order him to do. But still I cannot help thinking, that the rule laid down by Lord Chief Justice Lee in the case of *Jordan* v. *Lewis* is the correct one. . . . . .

The order made at the Old Bailey does not state that actions against prosecutors cannot be maintained without an order first obtained for a copy of the indictment, but only that they cannot be maintained without copies:" pp. 306, 307, and 308.

Caddy v. *Barlow*, 1 Man. & Ry. 275, is to the same effect.

In *Browne* v. *Cumming*, 10 B. & C. 70, "A rule had been obtained by the Attorney-General to restrain the plaintiff from using, in this cause, a copy of an indictment alleged to have been improperly obtained. It appeared by the affidavits, that in December, 1825, a commission of bankruptcy was issued against the plaintiff, under which he was declared to be a bankrupt, and the defendant Cumming was appointed an assignee. In 1827, Cumming and the other defendants prosecuted the

plaintiff for an alleged concealment and embezzlement of his effects, and at the Somerset summer assizes, 1827, he was tried and acquitted before Burrough, J. Browne's counsel thereupon applied for a copy of the indictment, but the learned Judge refused to order that it should be granted. Some communication was afterwards made by the learned Judge to Browne's counsel, which the latter considered as a promise to grant the order upon a fresh application; and accordingly an application was made, when the learned Judge stated that he had considered the matter, and found that he had not any authority to make such an order, except upon motion in open Court at the assizes, and that the Attorney-General alone had power to do it. An application was then made to him; and upon its being stated that Burrough, J., had promised to grant the order, and would have done so had he been authorized to do it, the Attorney-General gave his fiat for the granting a copy; which was done accordingly, and an action commenced against the defendants for a malicious prosecution. The Attorney-General having been afterwards informed by the learned Judge that he had not promised to grant the order, this rule was obtained."

Lord Tenterden, C.J., delivering the judgment of the Court, said: "Taking all the facts of this case into consideration, we do not think that there has been a mistake or misrepresentation of such a nature as to call upon the Court to interfere:" p. 73.

It is said that the Judges who made the order at the sessions in the Old Bailey in 16 Car. 2, had no jurisdiction to make such an order, and that it was illegal, as being contrary to the statute, 46 Edw. III., in these words: "Also the Commons pray, that whereas records, and whatsoever is in the King's Court ought of reason to remain there, for perpetual evidence and aid of all parties thereto, and of all those whom in any manner they reach, when they have need; and yet of late they refuse, in the Court of our said Lord to make search or exemplification of any thing which can fall in evidence against the King or in his disadvantage. May it please (you) to ordain by statute, that search and exemplification be made for all persons, . . . of whatever record touches them in

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any manner, as well as that which falls against the King as all other persons. *Le Roy le veut.*"

It cannot be supposed that the Judges who made this order were ignorant of this statute, or that they acted without jurisdiction in making it, having regard to the construction of the statute which then prevailed, and it is hard to believe that if this order was made without jurisdiction and was illegal, that it should have been recognized as binding for so many years by so many Courts and Judges without any objection being made to it by any one except by Chief Justice Willes.

It has been said that Denman, C.J., in *The King* v. *The Justices of Middlesex, In re Bowman,* 5 B. & Ad. 1113, intimated an opinion in accordance with that expressed by Chief Justice Willes; and that Patteson, J., intimated a like opinion in *The King* v. *Hewes,* 3 A. & E. at p. 732, but an examination of these cases will shew this to be erroneous.

The Court from the earliest times has directed the drawing up of records of conviction and acquittal to enable prisoners charged upon indictments to plead *autrefois convict* or *autrefois acquit.*

And in *Rex.* v. *Bowman* the prisoner was tried, convicted and sentenced at a sessions which had lapsed, and being brought up at a subsequent sessions for trial, and being desirous of pleading *autrefois convict,* and not being prepared with a record of the conviction, his trial was adjourned to the next sessions to enable it to be obtained: *Rex* v. *Bowman* (1833), 6 C. & P. 101.

The prisoner then moved for a mandamus to compel the justices to draw up a record of the conviction, and to this it was objected that the conviction was a nullity; but Denman, C.J., said: "The prisoner has a right to have the record of the proceedings which passed at sessions correctly made up, and to make any use of it that he can," obviously meaning for his defence to the pending indictment against him: *The King* v. *The Justices of Middlesex, In re Bowman,* 5 B. & Ad. 1113; *Rex* v. *Bowman* (1834), 6 C. & P. 337.

In *The King* v. *Hewes,* 3 A. & E. 725, the application was for a mandamus to the justices commanding them to correct the alteration made by the clerk of the peace in the minute of the verdict given by the jury, or to alter the minutes of the

verdict so given according to the fact. The prisoner was indicted for poisoning mares, by mixing poison with their food. The jury returned a verdict of "guilty by mischance," which the clerk of the peace entered in his minute book. The defendant's counsel submitted that the verdict was a special one, and amounted in law to an acquittal. After some observation by the counsel for the Crown, the chairman told the jury, that they must find the defendant either guilty or not guilty, and requested them to reconsider their verdict. They retired, and afterwards brought in a verdict of guilty, but recommended to mercy; and, being asked the ground of their recommendation, said that he did not do it with malicious intent but to benefit the condition of the horses. The Court refused the application, and Patteson, J., said in the course of his judgment: "So, in the present case, if it were necessary for the defendant to have a record made up, and the officer refused to do it, the party having a right to avail himself of the record might apply for a mandamus, as in *The King* v. *The Justices of Middlesex.*

Considering the length of time this order has been in force, and the great weight of authority by which it has been supported and recognized as binding, I do not feel warranted in holding it to have been made without jurisdiction, and to be contrary to the statute 46 Edw. III.

Nor do I feel warranted in holding, that the rule laid down by the Court of which Holt was Chief Justice, that "a man cannot have a copy of a record of a conviction of treason or felony without leave of the Attorney-General," and recognized ever since, is no longer binding because I am unable to trace and ascertain its origin.

I do not know what construction was put upon the statute 46 Edw. III. by the Judges, who had to construe it in those days; but I do know that before I could come to a conclusion, that it applied to proceedings against persons charged with treason or felony, I should have to hear the question argued, and at present it appears to me, that it did not apply to such proceedings until, at all events, they became records by the entry of final judgment.

This statute was referred to in the case already cited of *Groenvelt* v. *Burrell,* and has been insisted upon time and

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again by persons charged upon indictments of treason and felony, as entitling them to copies of the indictments, but always without success.

In the case of Edward Fitzharris, indicted for high treason, reported in 8 Howell's State Trials, page 225, this at page 259 takes place: "Mr. Wallop" (of counsel for the prisoner), "My Lord Coke, in his preface to the third Report, declares, That it was the antient law of England, and so declared by Act of Parliament in Edward 3rd's time, that any subject may, for his necessary use, have access to records and copies of them, be they for the King or against the King; and that the practice to the contrary is an abusion."

"L.C.J. (Sir Francis Pemberton), 'So then, Mr. Wallop, you take it that we are bound when any man is indicted of felony or treason, or any capital crime, if he say he must have a copy of the Record, we must grant him a copy of the indictment: if you think so, the Court and you are not of the same opinion:'" *Sir Richard Grahme's* case, 12 Howell 646.

In England the statute 7 Will. III., ch. 3, first gave a person charged with high treason or misprision thereof a right to a copy of the indictment, but in felonies to this day, the prisoner is not entitled to a copy of the indictment, and not even if he requires it in order to prepare a plea to it of *autrefois acquit*, but the Court will direct the clerk of arraigns to read the indictment over to him slowly and distinctly: *The King* v. *Vandercomb* (1796), 2 Leach C.C. 708.

And the Imperial statute, 6 & 7 Will. IV., ch. 114, sec. 4, first gave persons under trial a right to inspect at the trial the depositions taken against them.

And in this Province, the Act 4 & 5 Vict. ch. 24, first gave the right to persons under trial to obtain copies of the depositions taken against them, and to inspect them at the trial.

And in this Province, the Act 6 Will. IV., ch. 48, first gave to a person, charged upon an indictment for felony, a right to a copy of the indictment; but it was therein provided that such copy should not be received in evidence upon any trial for a malicious prosecution: this proviso clearly indicating the intention of the Legislature, to preserve the control of the Court and of the Crown over the proceedings in cases of felony.

This proviso remained in force till Confederation, and it was argued by counsel for the Crown that it was still in force in this Province; but this is a question which it is not necessary for me to determine in this case.

The rule that a person acquitted of felony shall not have a copy of the record of acquittal, for the purpose of being used in an action for malicious prosecution, without an order of the Court or the consent of the Attorney-General, has always been in force in this Province, and was maintained in *Regina* v. *Ivy*, 24 C.P. 78, and in *Hewitt* v. *Cane*, 26 O.R. 133, and I do not think that it should now be abrogated by judicial decision, but that it should be left to the Legislature to do so if it sees fit. The necessity for the rule is, at present at least, as great as it ever was, and if abrogated, some other safeguard against unfounded actions for malicious prosecution ought to be substituted for it.

The judgment appealed from, if affirmed, will overrule the decisions of *Regina* v. *Ivy* and *Hewitt* v. *Cane*, the cases not being distinguishable; for if the record of acquittal cannot be obtained without the consent of the Attorney-General, it can make no difference what officer of the Crown has the custody of the proceedings, and it cannot be said that the clerk of the peace is not such an officer.

In fine, my opinion is that the Crown, acting through the Attorney-General, has the right to refuse to permit its officers to draw up a record of acquittal of a person, charged upon an indictment for felony, to be used in an action for malicious prosecution, and that this appeal should be allowed with costs here and below.

OSLER, J.A.:—I agree in the reasoning and conclusion of the learned Chancellor's judgment, and would think it unnecessary to add anything, were it not that the point has long been considered a debatable one, notwithstanding some decisions of our Courts which are in effect overruled by our present judgment.

It is, in my opinion, the right of a person who has been acquitted of an offence to have the judgment in his favour duly entered up by the proper officer, upon application made to him

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for that purpose; and to obtain an exemplification of such judgment if necessary for the purpose of proving his acquittal.

It is conceded, that the practice—always doubted—by which such right has been denied, rests upon the celebrated Old Bailey order of King Charles the Second's time, 16 Car. 2, 1664-5. It is one of several "Orders and directions to be observed by justices of the peace and others, at the sessions in the Old Bailey at London and Middlesex:" Kelyng's Reports, preface. These were made by two of the chiefs of the common law courts and three other Judges. Their jurisdiction to make this particular order is not now discoverable. So far as we can judge from its terms, it owed its origin solely to the circumstances of the time, and was an attempt on the part of its framers to provide a remedy for what was then deemed to be a prevalent abuse, viz., "the late frequency of actions against prosecutors:" par. 6.

In *Lusty* v. *Magrath*, E.T. 5 Vict., 6 O.S. 340, Robinson, C.J., says, "The point does not seem to be quite satisfactorily settled:" p. 341.

From the well-known work, Stephens' Nisi Prius, vol. 3, pp. 2287-8, I cite the following: "'In *Groenvelt* v. *Burrell*, 1 Ld. Raym. 253 (M.T. 1697), Chief Justice Holt stated: if A. be indicted for felony and acquitted, and he has a mind to bring an action, the Judge will not permit him to have a copy of the record, if there was probable cause of the indictment; and he cannot have a copy without leave.' Chief Justice Holt was also present at the trial of Lord Preston (12 Howell 659-663), but there he does not deny, that a party acquitted of felony has a right to a copy of an indictment for the purpose of using it in evidence, although he refused it to a person about to take his trial for the offence charged in the indictment. In cases of misdemeanour it has been considered, that a party acquitted is entitled to a copy of the record: *Morrison* v. *Kelly*, 1 Wm. Bl. 385. So also of cases of summary convictions: *Rex* v. *Midlam*, 3 Burr. 1720. The distinction between such cases and those of indictments for felony seems to rest entirely on the order of the Judges made at the Old Bailey, as reported by Kelyng." The author adds in a note, p. 2287: "It is very questionable, whether the Judges did not exceed their authority when they

made this order; their power is to administer the law, not to alter it;" and see note to *Browne* v. *Cumming*, 10 B. & C. 70.

It is said that the order was republished at the Old Bailey sessions of May, 1739 (see reporter's note to *The King* v. *Brangan*, 1 Leach C.C. 27), but in that case Lord Chief Justice Willes refused upon application, to make an order that the acquitted prisoner should have a copy of the record, saying, that it was not necessary that he should do so, "that by the laws of this realm every prisoner upon his acquittal, had an undoubted right and title to *a copy of the record of such acquittal*, for any use they might think fit to make of it; and that after a demand of it had been made, the proper officer might be punished for refusing to make it out." See also the argument of counsel for the plaintiff, and the authorities cited in *Browne* v. *Cumming*, 10 B. & C. 70; *S.C.* 5 Man. & Ry. 118; 8 L.J. (O.S.) K.B. 89, in support of the contention that the Old Bailey order was at variance with the law as stated by Lord Coke in the preface to the third part of his Reports, where he says that "The records of the King's Courts, for that they contain great and hidden treasure, are faithfully and well kept, as they well deserve, in the King's treasury; and yet not so kept but that any subject may, for his necessary use and benefit, have access thereunto, which was the ancient law of England, and so is declared by an Act of Parliament, 46 Edw. III." These are, no doubt, the "laws of this realm" alluded to by Willes, C.J., and the text writer I have quoted.

And see *Caddy* v. *Barlow*, 1 Man. & Ry. 275, note (*a*), pp. 279, 280, where the statute is quoted and translated: "Also the Commons pray, that, etc. . . . May it please (you) to ordain by statute, that search and exemplification be made for all persons, . . . of whatever record touches them in any manner, as well that which falls against the King as other persons. *Le Roy le veut.*"

Taylor on Evidence, 1897, secs. 1488: "The inspection and exemplification of the *Records of the Queen's Courts*, when they are required for the purpose of *being given in evidence*, have been admitted, from a very early period, to belong to the public of *common right.*" See also secs. 1489, 1490, where the Old Bailey order is criticized and its authority denied. See also

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the 3rd edition of the same work (1858), sec. 1341; and Phillips on Evidence, 1839, 5th American from 8th London ed., pp. 802-3, to the same effect.

In *The King* v. *The Justices of Middlesex, In re Bowman,* 5 B. & Ad. 1113, a prisoner, indicted for felony, desired to have the record of proceedings against him therefor at a former session made up and a copy granted to him, for the purpose of pleading *autrefois convict.* Denman, C.J., said: "The prisoner has the right to have the record of the proceedings which passed at sessions correctly made up, and to make any use of it he can." As the editor of Russell on Crimes, vol. 3, p. 428, 5th ed., pointedly observes, if the prisoner is entitled as of right to a copy of the proceedings for the purpose it was there required for, "it is difficult to see why he should not have the same right for the purpose of instituting a civil suit to seek reparation for the injury which he has sustained by the malicious conduct of the prosecutor."

It cannot escape observation that the Old Bailey order makes no allusion to the fiat of the Attorney-General, which is what is now insisted upon as the essential thing, relying upon a dictum of Lord Holt in the case above cited of *Groenvelt* v. *Burrell,* which is, however, not noticed in the report of the same case, *sub nom. Greenvell* v. *Censor of the College of Physicians,* in 12 Mod. 145. It simply forbids a copy of the indictment from being given out "without special order upon motion made in open Court at the general gaol delivery." Such an order would have been unnecessary, if the right of the party to a copy of the record depended upon the fiat of the Attorney-General, and it can hardly be supposed, that the Judges would have made the order or assumed a jurisdiction which belonged to that officer, had he in fact possessed it.

It is foreign to the general principles of our law, that the right of one subject to pursue a civil remedy against another shall depend upon the permission of an official of the Crown, of however exalted a character; for if he may refuse to allow him to procure the evidence, without which his action cannot be successfully prosecuted, he does, in effect, refuse to allow him to maintain the action at all. A practice, moreover, which concedes the right to a copy of the record of acquittal on an

indictment for a misdemeanour, but denies it except by permission of the Attorney-General in the case of an indictment for a felony, is anomalous and wanting in principle. Other anomalies in the practice are noticeable in some of the decisions, as, for example, that if the exemplification of the record happens to have been procured without an order, or even by inadvertence or misapprehension on the part of the Judge in granting the order, the party cannot be prevented from using it: *Browne* v. *Cumming, supra*: *Lusty* v. *Magrath*, 6 O.S. 340; and if one of two persons, jointly tried and acquitted, has obtained a fiat therefor, it having been refused to the other, the latter may make use of the record thus obtained in his own action: *Caddy* v. *Barlow, supra.*

The distinction between indictments for felonies and misdemeanours, as regards the necessity for a fiat of the Attorney-General or Judge's order, was altogether an arbitrary one. Proceedings in both cases were in the King's Court, and these names being now abolished, and crimes described generally as offences, nothing remains to which the distinction can apply or make it necessary that a fiat should be applied for. I have no doubt that the officer of the Court has no authority to produce at the trial of a civil action the original record of criminal proceedings against the party, without the authority of the Court or Judge, or perhaps of the Attorney-General; although if he does so the evidence cannot be rejected: *Legatt* v. *Tollervey*, 14 East 302, 12 Rev. Rep. 518. But I do not see how this proposition conflicts with the right of the party to obtain an exemplification for the purpose of evidence, as neither the custody nor the preservation of the original is endangered or affected thereby.

In *Richardson* v. *Willis* (1872), L.R. 8 Exch. 69, it was held that the 13th section of 14-15 Vict. ch. 99 (Imp.), which allows a criminal record to be proved by a certificate of the officer having custody of the record, omitting the formal parts, applies to proof in civil as well as criminal proceedings. There is no suggestion in the case, that the right to obtain such certified copy depends upon the fiat of the Attorney-General or order of the Court. The Act merely substitutes a simpler mode of proof for the more expensive one of an exemplification.

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Upon the whole it appears to me that the authority for the Old Bailey order not being now discoverable we ought not to assume or invent one for it, or to treat it as applicable to proceedings in our Courts. The jurisdiction of the Judges to make it has been criticized and denied by eminent Judges and text-writers; and it appears to be directly in conflict with what, if one were now passing upon it for the first time, one would say with Lord Coke is the plain meaning of the statute 46 Edw. III., and the rights which that statute confers upon the subject.

Since the foregoing was written, the learned Attorney-General has informed the Court, that he has communicated with the law officers of the Crown in England, as to the state of the practice there on the subject. He appears to have the authority of the present and former Attorney-General for saying, that the practice which was supposed to be established here by *Regina* v. *Ivey*, 24 C.P. 78, and which is now insisted on by the appellant, is quite obsolete in England. That the Attorney-General's fiat is not deemed necessary, and that no obstacle whatever is placed in the plaintiff's way of obtaining the evidence of the termination of the proceedings against him. The practice of the Attorney-General holding, as it were, an enquiry as to the existence or absence of reasonable and probable cause is unheard of.

No technical objections were taken to the form of the application, or the sufficiency of the material on which it was launched. The question was argued on the merits, and I am of opinion that the appeal should be dismissed.

MOSS, J.A.:—The question presented for decision upon this appeal is whether a subject who has been prosecuted for a criminal offence which prior to the Criminal Code was classed as felony and acquitted, is obliged to procure the fiat of the Attorney-General as a condition to obtaining an exemplification or copy of the record to be used in an action for malicious prosecution as evidence of the favourable termination of the criminal proceeding.

The Divisional Court, reversing Falconbridge, C.J., has held, in favour of the subject, that he is entitled as of right to an

exemplification or copy, upon payment or tender to the proper officer having custody of the record or the materials from which it may be made up in the form prescribed by sec. 726 of the Criminal Code, of the fee or charges to which he is entitled.

Upon the appeal to this Court it was strongly urged that it was firmly settled in this Province that, once the Court at which a criminal trial has been held is over, no record of acquittal can be obtained or even made up without the fiat of the Attorney-General.

It was conceded, however, that the rule contended for was confined to cases of felony and had no application to cases of misdemeanour.

The existence of the right of a subject to a copy or exemplification of the record in a case of misdemeanour has long been recognized by Judges and text-writers. But the reason why, in a case of felony, a different rule should prevail does not manifestly appear. It seems to rest upon the Old Bailey order of 1641.

As shewn upon its face, this order was made by some of the Judges for the regulation of the Old Bailey sessions, and was promulgated with other matters directed "to be observed by the justices of the peace and others at the sessions of the Old Bailey." The frequency of actions against prosecutors "which cannot be without copies of the indictment" was alleged as the reason for ordering, that no copies of any indictment for felony be given without special order, upon motion made in open Court at the general gaol delivery.

This order imposed a new restriction upon what appears to have been theretofore recognized as the general right of any subject, viz., access to the judicial records of the King's Courts for his necessary use and benefit, "which was the ancient law of England, and is so declared by an Act of Parliament in the forty-sixth year of Edward III.:" Phillips on Evidence, p. 802, referring to 3 Inst. 71, where is to be found Sir Edward Coke's declaration, "And albeit the cause adjudged be particular, yet when it is entered of record, it is of great authority in law, and serves for perpetual evidence, and therefore ought to be common to all, yea, though it be against the King: as it is declared by

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Act of Parliament in *Anno* 46 E. III., which you may reade in the preface to the third book of my reports."

The practice of the Old Bailey seems to have spread to others of the Courts, but, nevertheless, the jurisdiction of the Judges to make the order was questioned on several occasions.

But even this order and the practice which grew upon it, only curtailed the right of the subject, while the indictment and papers were in the keeping of the Court during the session. It did not sanction any restriction upon inspection and right to copies or exemplification, when they had become judicial records by deposit with the appropriate official for safe keeping.

The necessity for a fiat from the Attorney-General in order to entitle a person to these privileges in a case of felony was recognized by some, but denied by others of the Judges of England. Even where the existence of the rule was acknowledged, the Courts were not indisposed to countenance a departure from it, as in *Jordan* v. *Lewis*, 2 Stra. 1122, 12 Rev. Rep. 520 (*n.*); *Legatt* v. *Tollervey*, 14 East 302, 12 Rev. Rep. 518; and *Browne* v. *Cumming*, 10 B. & C. 70.

In England the practice of requiring the fiat seems to have gradually died out, and apparently had fallen almost, if not wholly, into desuetude before 1851, in which year was passed the Imperial Act, 14 & 15 Vict. ch. 99.

The provisions of sec. 13 seem entirely at variance with the notion that a fiat from the Attorney-General was necessary. They seem almost to assume that no more is required than an application to the custodian of the record for a certificate in the terms of the Act. And, as I understand it, that is all that is now done in practice. At all events, we now know that for a considerable period, no such practice as that of requiring a fiat has prevailed in England, and that, if for any reason, an application is made for a fiat where a certified copy of the record of the indictment, trial, conviction and judgment, or acquittal in a case of felony is sought, the fiat is granted as a matter of course, even though the avowed object of procuring the copy is to make use of it in an action for malicious prosecution.

In *Regina* v. *Ivy*, 24 C.P. 78, the point whether a person tried for felony and acquitted could only obtain a copy of the

indictment and of acquittal to be used in an action for malicious prosecution on the fiat of the Attorney-General was raised, but was not actually determined, the decision turning upon the point of jurisdiction to entertain the motion. But Hagarty, C.J., inclined to the opinion, that the fiat was necessary; and Gwynne, J., expressed himself strongly in favour of that view. Galt, J., as far as appears, expressed no opinion. Gwynne, J., proceeded upon what he understood to be the universal practice prevailing in England, and relied upon the ancient cases. But in England these cases are now treated as obsolete, and in 1874, when *Regina* v. *Ivy* was decided, the practice under the Imperial Act, 14 & 15 Vict. ch. 99, sec. 13, had prevailed in England for twenty-three years, and in all likelihood was then the same, or nearly the same, as it is to-day.

In *Hewitt* v. *Cane*, 26 O.R. 133, the late Mr. Justice Rose, after a very full reference to the conflicting cases, thought it safe to follow the practice which had obtained for many years, and the opinions of Judges of our own Courts of co-ordinate jurisdiction. And he was inclined to the opinion, which, from his point of view, would seem the logical conclusion, that the rule applied as well to cases of misdemeanour as of felony after the indictments had been returned to the registrar of the Queen's Bench Division, who, I think, was at that date acting as clerk of the Crown and Pleas.

Meredith, C.J., while yielding to the authorities and concurring in the result of the judgment, expressed his own view to be opposed to the practice. MacMahon, J., agreed with Rose, J., except on one point.

Reading the cases, English and Canadian, touching the question, I do not find that any fixed rule has been settled by judicial authority. In the present state of the authorities, I think we are at liberty in this Court to place our own construction upon the 46 Edw. III., which is undoubtedly in force in this Province, and to say whether the exercise of the rights, thereby conferred, are subject to the restriction sought to be placed upon them, where a record of acquittal in a case of felony is sought for the purpose of being used as evidence in an action for malicious prosecution. In view of the many

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opinions which have been expressed, I venture mine with diffidence. On the whole, my conclusion is in favour of upholding the judgment appealed from.

I am not able to place upon the comprehensive language of the 46 Edw. III. the restricted meaning which has been contended for. It appears to me, to apply to all judicial records, as well criminal as civil, and to give the subject access to them for his necessary use and benefit, which was, and is, the law of England. To my mind the declaration of Willes, C.J., in *The King* v. *Brangan*, 1 Leach C.C. 27, that by the laws of the realm every prisoner upon his acquittal had an undoubted right to a copy of the record of such acquittal, is a plain declaration of the meaning of the ancient statute.

I venture to think, that the practice of requiring a fiat is not in accord with the true spirit and meaning of the law, as declared in the statute; is not even supported by the Old Bailey order, which, as before pointed out, did not extend the restriction beyond the time when the Court was actually in session, and is not adapted to modern conditions.

The law gives a right of action for malicious prosecution, and if it is desirable to place restrictions upon the general right of a person, who has been acquitted of a criminal charge, to maintain such an action, the Legislature can so declare. In it resides the power to provide safeguards against frivolous or vexatious actions, if any safeguards are deemed necessary.

Possibly if the trial of such actions were committed to Judges alone no further safeguard would be required.

I would affirm the order appealed from.

MACLENNAN, J.A., concurred with OSLER and MOSS, JJ.A.

LISTER, J.A., died while the case was *sub judice.*

G. A. B.

[IN CHAMBERS.]

RE ESTATE OF ISABELLA MCMILLAN.

1902
June 30.

Will—Construction of—"Chattels"—Mortgage for Purchase Money.

A testator, after devising "all that I possess to be disposed of as follows," made two specific devises of land, and then bequeathed to his two sisters "all my chattels and movables and all monies on hand and monies to be received by my notes, and in case any one of my said sisters should die before me, I will and bequeath the said chattels, monies and notes to" the survivor. Part of his estate consisted of a mortgage for unpaid purchase money on a sale of one of the pieces of land specifically devised, sold by him in his lifetime.

Held, that the mortgage passed under the above bequest as a chattel.

THIS was an application by the executors of the will of Isabella McMillan, under Rule 938, for the purpose of ascertaining whether Isabella McMillan was entitled to a certain mortgage made in favour of John McMillan, or whether John McMillan died intestate in respect to such mortgage.

The provisions of the will and other facts of the case are stated in the judgment of BRITTON, J., before whom the case was argued in Chambers on June 20th, 1902.

C. A. Masten, for the executors of Isabella McMillan, contended that "chattels" covers all personal estate: Bouvier's Law Dict. *sub voc.*; *Portman* v. *Willis* (1595), Cro. Eliz. 386; Jarman on Wills, 5th ed., p. 706; Co. Lit., vol. 1, 118 *b.*; *Langdale* v. *Whitfeld* (1858), 4 K. & J. 426.

W. M. Douglas, K.C., for two of the next of kin of John McMillan, contended that the superadded expressions, "monies in hand and monies to be received by notes," shewed the preceding words were not to be understood in the widest sense: Jarman on Wills, 4th ed., p. 753.

Masten, in reply, referred to Jarman on Wills, 5th ed., at p. 710; *Bennet* v. *Batchelor* (1789), 1 Ves. Jr. 63.

June 30. BRITTON, J.:—John McMillan was an unmarried man, of considerable means, residing in the township of Cornwall. He made his will on February 27th, 1886, apparently disposing of all his property. At that time he was the owner

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of two parcels of land. He devised one parcel to the Reverend George Corbett, and the other parcel to his sisters, Mary McMillan and Isabella McMillan. Then follows this clause in the will: — "I will and bequeath to my sisters, Isabella McMillan and Mary McMillan, all my chattels and movables, and all monies on hand and monies to be received by my notes, and in case any one of my said sisters should die before me, I will and bequeath the said chattels, monies, and notes to the one of said two sisters that may survive me."

There is no question of survivorship between the sisters, as Mary McMillan died before the testator. After her death, John McMillan, by a codicil dated August 14th, 1892, "erased," as he says, from the will the parcel of land devised to Mary and Isabella, and devised it to Isabella. He made no other change in the will.

John McMillan, before the making of this codicil, had sold the land devised to Corbett, and the mortgage in question is for the unpaid purchase money upon that land.

The Reverend George Corbett, devisee of one parcel of land, was named by John McMillan as an executor to his will. John died on January 23rd, 1893. His executors renounced probate, and Isabella, in October, 1893, took out letters of administration with the will annexed.

The mortgage in question was part of the estate of John McMillan which Isabella took over, and part of which has been collected by her. No claim under John McMillan's will was ever made to the mortgage by the Reverend George Corbett or any one else until now. Isabella McMillan died on December 31st, 1900, a spinster, bequeathing all her estate to the Reverend Father McDonnell and the Reverend Father Corbett. The executors of Isabella desire the assistance of the Court in dealing with this mortgage. Did the mortgage in question go to Isabella, as the sister who survived the testator, under the word "chattels" in this will?

The older definition of "chattel" is "every species of property, movable and immovable, which is less than freehold."

The word "goods," when construed in the abstract, "will comprehend all the personal estate of the testator, . . and a bequest of all the testator's 'chattels' will have the same

effect as a bequest of all his 'goods and chattels:'" Williams on Executors, 9th ed., p. 1040.

The word "chattels" "will comprise the entire personal estate of a testator, unless restrained by the context within narrower limits:" Jarman on Wills, 6th ed., p. 706.

The word "chattel" may be limited as to locality. There is no such limit here.

Then the word is limited when a class or kind is indicated by the context; or a limited meaning may be found by applying the rule "*ejusdem generis.*"

I had a little difficulty, because of the word "chattels" being associated with "movables," but that word is omitted when giving his property to the survivor, and that, together with the clause, "I devise all that I possess to be disposed of as follows," confirms me in the opinion that the testator intended by the word "chattels" all except land.

A great many cases are collected and cited by Jarman on Wills in his 6th ed., vol. 1, p. 715, and he says:—"These cases indicate the disposition of the Judges of the present day to adhere to the second rule, which gives to words of a comprehensive import their full extent of operation, unless some very distinct ground can be collected from the context for considering them as used in a special and restricted sense."

The cases are conflicting; there are subtle distinctions difficult to follow.

In *Langdale* v. *Whitfield*, 4 K. & J. 426, the word "moneys" in *codicil* was held to comprise not only all moneys on hand, but also all moneys due to testator whether upon security or otherwise, notwithstanding express mention made in *will* of "moneys and securities for money."

I see nothing in the context here which should limit the meaning of the word "chattels;" and I am of opinion that the mortgage in question passed to Isabella McMillan under the will of John McMillan, and must now be dealt with by the executors of Isabella McMillan.

Costs of all parties out of the estate of Isabella McMillan.

A. H. F. L.

[IN CHAMBERS.]

1902

Sept. 12.

RE MURRAY.

Specific Performance — Lease — Undertaking to Build — Non-performance in Lifetime of Lessor—Devise to Lessee—Damages.

By an instrument dated 29th January, 1901, a father leased a farm to his son for five years from the 1st March, 1901, at a yearly rental of $200 payable in October of each year, and undertook to build on the farm, during the first year of the term, a house of certain expressed dimensions. There was a provision in the instrument for the determination of the lease at the end of any year by notice to that effect given in October previous. The father died on the 19th June, 1902, after the expiry of the first year of the term, but had not built nor done anything towards building the house. By his will, dated the 7th February, 1901, he devised the farm to his son, but made no reference to the lease :—

Held, that (the father having died after breach of the undertaking) the son was not entitled to have the house built at the expense of the father's personal estate, but at most was entitled to damages for non-performance of the agreement to build.

Cooper v. *Jarman* (1866), L.R. 3 Eq. 98, and *In re Day*, [1898] 2 Ch. 510, distinguished.

AN originating notice under Rule 938 by Neil S. Murray, executor of the will of James Murray, for an order declaring the true construction of the will and determining certain questions arising in the administration of the estate. The facts are stated in the judgment.

The application was heard by BOYD, C., as in Chambers, at Woodstock, on the 9th September, 1902.

Peter McDonald, for the executor.

J. W. Mahon, for John Robert Murray.

J. P. Mabee, K.C., for Andrew W. Murray.

A. S. Ball, K.C., for the official guardian, representing Maggie Jane Murray and James Norval Murray.

September 12. BOYD, C.:—I disposed of all questions brought before the Court on the application at Woodstock, except as to the liability in respect to the building of a house upon the farm devised to John Robert Murray.

The father (now dead) made a lease of this farm to his son J. R. Murray for five years from the 1st March, 1901, at a yearly rental of $200 payable in October each year, and

undertook to build a house on the farm, of certain expressed dimensions, during the first year of the term.

There was a provision for the determination of the lease at the end of any year by notice to that effect given in October previous.

The father died on the 19th June, 1902, after the expiry of the first year of the term, but had not built or done anything towards building the house.

By his will dated the 7th February, 1901, the father devised this farm on certain conditions, not now material, to his son the lessee. But no reference is made in the will to the lease, which is dated 29th January, 1901, some nine days before the date of the will.

It is argued that the devisee is entitled to have the house built on the land at the expense of the personal estate, and it is counter-argued that at most the devisee as lessee can only get damages for non-performance of the agreement to build.

I think this latter the better construction, and so decide. The cases relied on for the devisee are somewhat like this but broadly distinguishable.

In *Cooper* v. *Jarman* (1866), L.R. 3 Eq. 98, the testator had made a contract to build on the land devised, and the work had begun before the death, but was interrupted by the death. The work was completed by the personal representative after the death, and the question arose whether the expense of completion should be borne by the personal estate, and that was answered in the affirmative. The Master of the Rolls held that the testator, having made such a contract to build, intended to have the house built, and had thereupon proceeded with the erection of it till the time of his death. Had the work been then stopped, an action for damages would have arisen to the contractor as for breach of contract, and he held that the duty of the personal representative was not to break the contract, but to complete it. It was better to pay money in order to finish the building and so benefit all parties than waste it in paying damages for a broken contract.

The other case cited of *In re Day*, [1898] 2 Ch. 510, is based on and follows the case in 3 Eq. There is only this difference, that whereas in the earlier case the work had been

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completed and paid for, in the latter the executors had forbidden the builders to go on with the completion after the death; but the Court held that it should be finished at the cost of the personal estate.

The common ground of decision in both appears to be, that, as there was an existing contract, with work partly performed thereon before the death, it was the duty of the estate to carry out to completion at the cost of the personalty.

Here the marked distinction exists that there was no existing contract in course of performance when the testator died. On the contrary, the contract had been broken; the time for performance had elapsed, and nothing had been done in the way of building. A new liability had arisen against the testator for damages because of his non-performance. Such was the condition of affairs when the will became operative at the father's death.

This contract to build is very vague, and is not *per se* capable of specific enforcement; had the father lived, the son as lessee could have had no relief in the Courts for this breach of contract other than one sounding in damages. His death has not enlarged or changed that remedy, and to that the son, as lessee, or devisee, is confined.

If the parties can agree to assess the amount of these damages, which I take to be the difference in value of the possession of the farm with and without a house during the currency of the lease from the time the house should have been built—it will save much expenditure of money, time, and perhaps temper.

T. T. R.

[IN CHAMBERS.]

PLATT V. BUCK.

1902
June 16.

Production—Correspondence between Solicitor and Client—Common Grantor—Possession of Letters by Defendant.

Letters passing between a solicitor and his client, who was the common grantor of the plaintiff and defendant, in respect to the property in dispute, and which had passed into the possession of the defendant from the executor of the client after his decease were held not privileged from production.

THIS was a motion by the plaintiff to compel production by the defendant of certain letters which had passed between one Benjamin C. Platt, the common grantor of the plaintiff and defendant, in his lifetime and his solicitor, in reference to a certain action then pending in connection with the property in question in this action, and which letters had come into the possession of the defendant from the executor of Benjamin C. Platt.

The motion was argued before Mr. Winchester, the Master in Chambers, on the 12th June, 1902.

H. L. Drayton, for the motion. Even if Benjamin C. Platt could claim privilege for these letters in his lifetime, or his executor, having possession of them, could after his decease: the fact is he has handed them over to the defendant, and they are not now privileged in her hands.

C. A. Masten, contra. Platt could claim privilege in his lifetime, and his executor is in the same position. The fact that the letters have gone out of his possession into the possession of the defendant is not material, for the executor now claims the privilege. They also refer to the title of the defendant, and she is not bound to produce them.

Drayton, in reply. The title is a common title to both plaintiff and defendant, and the plaintiff is entitled to their production.

June 16. THE MASTER IN CHAMBERS:—This is an action by one of the heirs at law and next of kin of the late Benjamin C. Platt, against the defendant, who is a grantee of certain

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property from the said Benjamin C. Platt, as also a devisee under his last will and testament.

The action is to set aside the conveyance to the defendant, and also the will, on the ground that they were obtained by the defendant through undue influence, and that he was not in a fit condition to execute same, and there was no consideration therefor.

The defendant, in her affidavit on production, sets forth certain letters which she refuses to produce on the ground that they are privileged, as passing between the late Benjamin C. Platt and his solicitor. The letters refer to a suit brought by the said Benjamin C. Platt in his lifetime in connection with the very property herein, and they may be material at the trial herein, as sworn to by the agent of the plaintiff's solicitor.

In my opinion, the production of this correspondence as between the plaintiff and defendant herein—both claiming title through Mr. Platt—is not privileged: see *Russell* v. *Jackson* (1851), 9 Ha. 387; *Gresley* v. *Mouseley* (1856), 2 K. & J. 288; and *Bullivant* v. *The Attorney-General of Victoria*, [1901] A.C. 196, at p. 206.

The order will go for their production on or before the 18th June instant. Costs to plaintiff in any event.

G. A. B.

[IN THE COURT OF APPEAL.]

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THE DOMINION COUNCIL OF CANADA AND NEWFOUNDLAND ROYAL TEMPLARS OF TEMPERANCE.

Life Insurance—Benevolent Society—Beneficiary Certificate—Alteration of Constitution—Domestic Forum—Retroactivity—R.S.O. 1877, ch. 167, sec. 4—Ib., 1897, ch. 211, sec. 5—Ib., ch. 203, sec. 2, sub-secs. 41 (a) (g) and 42—Ib., sec. 80.

A beneficiary certificate, dated October 19th, 1896, issued by a friendly society incorporated under The Benevolent Societies Act, R.S.O. 1877, ch. 167, was conditioned, *inter alia*, that the beneficiary complied with the constitution, rules, or orders governing, "or that might thereafter be enacted by the defendants to govern the order and its benefit funds," and by it the defendants agreed that on the plaintiff, the beneficiary, attaining the age of 70, which he had done, they would pay out of the total disability fund, "in accordance with the laws governing such fund," sums not exceeding a certain amount:—

Held, that the constitution of the defendants having been duly altered in 1900 in respect to a beneficiary claiming on the ground of having attained the age of 70 years, from what it was in 1896, when the plaintiff's certificate was issued, in such a way as to diminish the amount the plaintiff would be entitled to, he was nevertheless bound by the alteration, and could only recover in accordance with it.

Held, also, that the plaintiff was not bound to exhaust, before action, the appeals within the society provided for by the rules, for under R.S.O. 1897, ch. 203, sec. 80, every lawful claim against an insurance corporation under an insurance contract shall become legally payable 60 days after proper proof of loss, and any rules, conditions, or stipulations to the contrary shall, as against the assured, be void.

A provision of the defendants' constitution provided that the plaintiff must sign an acceptance subscribed thereto, which he had not done until shortly before action brought:—

Held, that the defendants, having assessed the plaintiff and accepted payment of the assessments on the footing of an existing certificate, and having accepted proofs of claim and paid part on account thereof, had waived this requirement.

Held, also, that the optional or special benefit which the plaintiff was claiming being payable in full and not by instalments, he was not estopped from insisting that the whole of the benefit was due, merely by reason of having accepted a cheque expressed to be for the full amount of the first instalment thereof.

Judgment of MacMahon, J., varied.

THIS action was brought to recover the sum of $1000 on a disability benefit certificate issued by the defendant company to the plaintiff, under the circumstances set out in the judgment.

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The action was tried before MACMAHON, J., without a jury, at Hamilton on April 17th, 1901.

S. F. Washington, K.C., for the plaintiff.
G. H. Watson, K.C., and *Z. Gallagher*, for the defendants.

June 19. MACMAHON, J.:—The defendants are a friendly society within the meaning of the Insurance Act, and the plaintiff became a charter member of the society in April, 1884, at which time and up to 1894 the certificates issued by the society provided for payment from both the total disability and death benefit funds.

The society changed the system, making the disability certificate a separate one, and on October 19th, 1896, issued a certificate under its corporate seal replacing the former one by which it agreed to pay to the plaintiff on his attaining the age of seventy years, sums not exceeding in the aggregate one thousand dollars, or if less than that amount sums not exceeding in the aggregate an amount equal to $1.00 for each and every total disability member of the society in good standing.

The plaintiff's action is founded on the certificate so issued, and in his statement of claim it is alleged that he attained the age of seventy years on September 9th, 1900, and he claims to be entitled to be paid under the terms of the certificate the sum of $1000.

The defendants by their statement of defence besides denying the allegations in the plaintiff's statement of claim set up:—

"2. The defendants say that they issued a certificate to the plaintiff on or about October 19th, 1896, which certificate contains the following clause: 'Provided also that this certificate shall not come into force until and unless it has been signed by the select council and the beneficiary secretary, sealed with the seal of the select council and the member has been raised to the select degree in accordance with the constitution and ritual thereof at a legal meeting and has signed the acceptance subscribed hereto. No select council has power or authority to waive any of the provisions hereof.' The plaintiff had not signed the said acceptance according to said provision

up to and including the 31st day of January, 1901,* and the said contract had not then been accepted by him nor had the said certificate gone into force.

"3. The defendants say that if the plaintiff has accepted the said certificate since that time he has not furnished the defendants with proofs of claim since said date nor has sixty days elapsed from the coming into force of the said certificate and the plaintiff is not entitled to sue on the said contract at all events until the elapse of sixty days from the furnishing of reasonable proof of the event on which said claim by said contract was to accrue or until sixty days from the coming into force of the said contract if at all.

"4. The defendants further say that if it is held that the said certificate became in full force and effect notwithstanding the non-acceptance by the plaintiff as required by the said certificate the defendants say that in the event of the plaintiff claiming the total disability insurance on the ground of having attained the age of seventy years that according to the constitution of the defendants adopted on March 24th, 1900, the plaintiff is not entitled to receive a full instalment of the benefit until the first day of July, 1914, but he has the option of receiving such a benefit as is equal to the sum of four dollars for each and every dollar he has contributed to the total disability fund since the first day of July, 1894; and said insurance according to the constitution of the said defendants is payable in four equal annual instalments, provided that the plaintiff remains true to the obligations of the order and continues to pay all total disability assessments that may be levied. The defendants on or about October 8th, 1900, not being aware that the plaintiff had not accepted the said certificate as required by the terms thereof, were induced to pay to the plaintiff a cheque for $27, being in full of the first annual instalment of the plaintiff's claim under said certificate and notwithstanding the plaintiff did not then accept said cheque, subsequently and after full explanation the plaintiff on November 9th, 1900, agreed with the defendants to accept $108 in four equal annual instalments in full of all

* The plaintiff commenced his action on March 9th, 1901.—REP.

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benefit due or to accrue due under the said certificate, and on the said date the plaintiff accepted the first instalment of $27 and the defendants submit that the plaintiff is estopped from claiming that any further amount or amounts are due the plaintiff under the said certificate or shall become due other than as agreed as hereinbefore set out.

"5. The defendants further say that the plaintiff not having disclosed to the defendants that the plaintiff had not accepted the said certificate as required by the terms thereof made application to the defendants through his subordinate council for insurance moneys under the said certificate on or about October, 1900, and upon the plaintiff not accepting the ruling of the Dominion secretary it was his privilege and duty under the constitution of the defendants to appeal from said ruling, whereupon the plaintiff did appeal to the board of directors of the defendant association on or about October 29th, 1900, and subsequently the plaintiff appealed to the Dominion councillor on the 17th day of February, 1901, and the plaintiff promised to appeal according to the said constitution of the Dominion council as it was his duty to do, but notwithstanding the defendants gave him full information as to the manner of said appeal he refrained from appealing to the Dominion council and thereby did not exhaust the said courts of the order as provided by the constitution, and consequently the defendants submit the plaintiff is not entitled to take proceedings in a court of law until he has exhausted the courts of the order.

"6. The defendants further submit that by the plaintiff instituting proceedings against the defendants in a court of law before he had exhausted the courts of the association and contrary to the expressed terms of the said certificate the said certificate is thereby rendered null and void."

The plaintiff made a declaration before a commissioner on September 29th, 1900, as to his age on a form furnished by the association, in which he stated he knew his age from the record in the family Bible, and from this means of knowledge he knew he was born in the parish of Colstock (England) on or about September 9th, 1830.

A certificate of the total disability of the plaintiff signed by the select councillor and the recording secretary of the council of which the plaintiff was a member, attested by the seal of such council, was issued recommending the payment of the plaintiff's claim. In the certificate the question is asked: 7. "Has the declaration of application as to proof of age been submitted to the council?" The answer was "Yes." 8. "State nature of proof submitted by applicant." Answer: "Record in family Bible."

At the trial the defendant said he came to Canada when he was twenty-two years old, and was told by his parents when leaving England that he was born on September 9th, 1830; the date was so entered in his own family Bible.

The board of directors acted on the declaration as to age and the certificate of Victoria council, and the Dominion council issued cheques payable to the plaintiff's order for the amount to which they considered him entitled under his membership certificate without demanding any further proofs as to age.

The society has, I consider, waived their right to any further proof as to age.

The defendants had not on January 31st, 1901, signed the benefit certificate, although prior to that it had been signed by the select councillor and the beneficiary secretary and sealed with the seal of the select council (Victoria council) certifying that the plaintiff had been raised to the select degree and had signed the acceptance.

The select council had no power to waive any of the provisions of the certificate, but the Dominion council of the society accepted from the select council of which the plaintiff was a member the fees paid by him, and in its communications with the plaintiff for the purpose of effecting a settlement with him on the basis contended for by it, treated the contract as having been accepted and the certificate as being in full force. The Dominion council had power to waive and they did waive this requirement, as they treated with the plaintiff throughout as having attained the age of seventy years and therefore totally disabled within the law (sec. 262 of the constitution of the society) and consequently entitled to claims from the funds

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of the society in respect of such total disability; the only question being as to the amount he was, under the terms of the certificate and the by-laws of the society entitled to receive.

The general laws of the society (1900) sec. 199, provide (sub-sec. 3) that any aggrieved party failing to make an appeal from any action or decision in the manner and within the time laid down by the constitution shall have no other recourse whether in law or in equity in respect of the subject matter of such action or decision. And sec. 201 (1) All appeals arising in any of the councils in connection with the insurance department and in all matters relating to the insurance laws of the order shall be direct to the Dominion councillor. (2) From the Dominion councillor to the board of directors. (3) From the board of directors to the Dominion council, whose decision shall be final on all questions.

And by sec. 204 : No member shall be entitled to bring any civil action or other legal proceedings against the Dominion council until he shall have exhausted all the remedies provided in the constitution and by-laws of the order by appeals, and any member bringing an action against the Dominion council before he shall have exhausted all remedies by appeals shall *ipso facto* stand suspended from the order.

The fifth paragraph of the statement of defence sets up that the plaintiff not accepting the ruling of the Dominion secretary it was his duty to appeal to the board of directors, which he did, and that he was subsequently directed to appeal to the Dominion council, but he refused to do so and was not entitled to take proceedings at law until such appeal was taken and disposed of.

Whatever was done on the application of the plaintiff for the insurance moneys claimed by him was the act of the Dominion council. The board of directors being satisfied with the proofs furnished of the total disability of the plaintiff, under sub-secs. 1 and 3 of article 12 of the Dominion council constitution, the Dominion council decided upon the amount to which they considered the plaintiff entitled under his certificate, and the cheques are signed by the proper Dominion council officers, viz.: by Geo. H. Lee, Dominion councillor, and C. VanNorman Emory, the Dominion secretary.

The decision being that of the Dominion council it would be absurd if there could be an appeal to the Dominion councillor and then to the board of directors and so back to the Dominion council.

The appeals referred to in sec. 201, relating to insurance matters are "appeals arising in any of the councils." The select council, of which the plaintiff was a member, having sent the certificate of plaintiff's total disability to the Dominion council, there its functions ended, and it had nothing to do with the action of the board of directors or the Dominion council in passing upon the plaintiff's claim or directing cheques to issue for the payment of the amount to which the latter decreed him entitled.

The cheques when signed by the Dominion councillor and Dominion secretary were sent to the select council of which the plaintiff was a member that they might be transmitted to him.

On March 11th, 1901, the beneficiary secretary of Victoria council, under instructions from A. M. Featherstone, insurance manager of the association, notified the plaintiff that he had suspended himself from membership by entering an action against the Dominion council before exhausting the courts of the order. And on March 30th the beneficiary secretary refused to accept $4.45, the amount of fees assessed against the plaintiff under his certificate, because of his suspension for the reasons above stated.

The plaintiff could not, as I have found, be legally suspended for the cause assigned, and he was at the time he tendered his fees and now is a member of the defendant association.

The Court of Appeal decided in *Hargrove* v. *The Royal Templars of Temperance* (1901), 2 O.L.R. 79, that under the laws the plaintiff could not recover the full benefit of $1000, but only the amount payable in accordance with the laws governing the fund out of which it is payable, which under article 12, sec. 3, was "such a benefit as shall be equal to as many one-hundreth parts of the full benefit as he shall have contributed dollars to this fund from the first of July, 1894." That proportion was reduced to one hundred and fiftieth part, by an amendment passed September 7th, 1898, and was further reduced, as appears by the amended constitution

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adopted March 24th, 1900, to the sum of $4 for each and every dollar he may have contributed to this fund since the first of July, 1894.

The plaintiff had contributed $27 to this fund, so that under the constitution as last amended he would only be entitled to the sum of $108. According to the certificate the plaintiff is bound by the "constitution, laws, rules and orders governing or that may hereafter be enacted by the Dominion council to govern the order and its benefit fund." But this does not, I consider, authorize the Dominion council to cut down the benefit to which the plaintiff was, under the constitution, entitled at the time when the membership certificate was issued to him. He is, therefore, entitled to a present payment of $270.

I find that the plaintiff accepted and cashed the cheque for $27 only as a payment on account of the claim he was making for $1000, being the full amount of payment under the "Benefit Certificate."

There will be judgment for the plaintiff for $243 (being $270, less $27 received by him) with costs of suit on the Superior Court scale.

The defendants appealed to the Court of Appeal, and the appeal was argued on November 11th, 1901, before ARMOUR, C.J.O., and OSLER, MACLENNAN, MOSS, and LISTER, JJ.A.

Watson, K.C., and *Gallagher*, for the appellants, contended that they had full power to pass a by-law lessening the amount to which a member should be entitled: constitution of 1900, sec. 39, providing for amendments to the constitution on a two-third vote of the Dominion council; *Baker* v. *Forest* (1897), 28 O.R. 238, 24 A.R. 585; *Pepe* v. *The City and Suburban Permanent Building Society*, [1893] 2 Ch. 311; *Bradbury* v. *Wilde*, [1893] 1 Ch. 377; *Smith* v. *Galloway*, [1898] 1 Q.B. 71; *Wilson* v. *Miles Platting Building Society* (1889), 22 Q.B.D. 381; *Rosenberg* v. *Northumberland Building Society* (1889), 22 Q.B.D. 373; Diprow's Cases Affecting Friendly Societies (*Dickson* v. *Thompson*) at p. 46; *Ib.* (*Stoke* v. *Mutual Provincial Alliance*) at p. 195; *In re The Supreme Legion Select Knights of Canada* (1900), 31 O.R. 154;

Wells v. *Independent Order of Foresters* (1889), 17 O.R. 317, 324; that here there had been no completed contract, as the certificate was never accepted: *Devins* v. *Royal Templars of Temperance* (1893), 20 A.R. 259, 265; and that the plaintiff had not duly prosecuted the appeals open to him within the society, and so had no right of action: *Essery* v. *Court Pride of the Dominion* (1883), 2 O.R. 596; *Field* v. *Court Hope* (1879), 26 Gr. 467; *Dale* v. *Weston* (1898), 24 A.R. 351, at p. 354.

Washington, K.C., for the respondent, contended that the Dominion council had no right to cut down the plaintiff's benefits, and that this was the sole question; and that *Hargrove* v. *Royal Templars of Temperance*, 2 O.L.R. 79, so far as at variance with this contention, is erroneous and ought to be reconsidered and reversed; that there was no appeal here from any officer or any council of the appellants, nor had there been any such decision to be appealed from; and that the contract was complete when the respondent made his application and the appellants issued their certificate: R.S.O. 1897, ch. 203, secs. 80, 85; Bacon on Benefit Societies, sec. 85; *Prince of Wales Insurance Co.* v. *Harding* (1857), E.B. & E. 183.

June 28. The judgment of the Court was delivered by OSLER, J.A.:—This is an action brought upon a beneficiary certificate dated October 19th, 1896, whereby, after setting forth that it was issued by the defendants to the plaintiff, being a select member of Victoria Council, No. 7, located at Dundas, Ont., upon the express condition that the statements made by him in his application for select membership and for the benefits of the order were a part of the contract, that he had been raised in accordance with the ritual of the select degree, and upon condition that he faithfully maintained his pledge of total abstinence, and complied with the constitution, laws, rules and orders governing, or that might thereafter be enacted by the defendants to govern the order and its benefit funds, it is witnessed that these conditions being complied with, the defendants promise and agree, upon receiving evidence satisfactory to the board of directors that the said member has become totally disabled, and that such disability is conclusively

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permanent; or that he has attained the age of 70 years, and of his being in good standing in the select degree, and upon the production or surrender of certificate, to pay out of the total disability fund, in accordance with the laws governing such fund, sums not exceeding in the aggregate $1000, but if less than that amount, sums not exceeding an aggregate equal to $1 for every total disability member in good standing, etc.

It is thereby also provided and agreed that no assignment of the certificate shall be valid, and that it shall become null and void if the member fails to comply with the constitution, rules and regulations of the order.

It is also further provided that the certificate shall not go into force until and unless it has been signed by the select councillor and beneficiary secretary, and the member has been raised to the select degree in accordance with the constitution and ritual at a legal meeting, and has signed the acceptance subscribed thereto.

The certificate is duly signed by two of the head officials of the order, under the seal of the Dominion council, and then follow the seal of the select council and the signatures of the prescribed officers of that council, and their certificate that the plaintiff was raised to the select degree according to the forms and ritual thereof in Victoria Council No. 7 on January 30th, 1880.

Below this follows the acceptance: "I accept this certificate upon conditions named herein," signed by the plaintiff.

The plaintiff claims payment of the $1000 in question out of the total disability fund of the defendants on the ground that one of the events on which it was to become payable, viz., the attainment of the plaintiff of the age of seventy years, has occurred. The defendants resist the claim on several grounds, *inter alia*: (1) The non-signature by the plaintiff before the attainment of the specified age of the acceptance of the certificate. (2) That by the constitution of the defendants, adopted on March 24th, 1900, it is provided that a beneficiary claiming on the ground of having attained the age of seventy years shall not be entitled to receive a full instalment of the benefit (*i.e.*, one-fourth) until the year 1914, and has the option (which the plaintiff in this case exercised) of receiving such a benefit as is

equal to $4 for every dollar he has contributed to the total disability fund since July 1st, 1894 — such benefit being payable in four equal annual instalments, and amounting in all to the sum of $108, of which the defendants have tendered and paid the plaintiff the sum of $27, being the first instalment thereof. (3) That the defendants' Dominion secretary having refused or rejected the claim as made by the plaintiff, it was his duty under the rules of the order to have appealed therefrom to the courts of the order, as provided by the constitution, and he is not entitled to sue at law until he has exhausted his appeals within the order.

The defendants are a friendly society (see *Ontario Gazette*, Jan.-June, 1900, p. 409) within the meaning of the Ontario Insurance Act, and were incorporated under the Benevolent Societies Act, R.S.O. 1877, ch. 167.

The plaintiff became a beneficiary member of the order in the year 1884. He was previously thereto the holder of a beneficiary certificate in some earlier association of a similar kind which was taken over by or amalgamated with the defendants in that year. The plaintiff exchanged that certificate for a combined death benefit and total disability benefit certificate in the new association.

In 1894 the defendants by an alteration in their constitution separated these two classes of certificates, and provided that the holder of a total disability benefit certificate, on attaining the age of seventy years, should be deemed totally disabled within the meaning of the clause of the constitution dealing with the payments of benefits of that class; and the holder of a combined certificate was to be at liberty to exchange it for separate certificates. As the seventy years' total disability clause was not to come into force until July 1st, 1914, it was soon afterwards seen that old members would be practically unable to avail themselves of it, and in March, 1896, the constitution was again altered so as to give the holders of total disability certificates an option of at once taking a diminished benefit on attaining the age of seventy years. In October, 1896, while the constitution of 1894 as thus amended was in force, the plaintiff obtained the beneficiary certificate already set forth, and, as I infer from his evidence, a death

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benefit certificate also, in exchange for his former certificate. He was then a member in good standing, and from that time forward remained so, paying all fees, dues and assessments, and complying with all the laws, rules and orders governing the order. He did not, however, actually sign the acceptance at the foot of his beneficiary certificate until shortly before action brought. He attained the age of seventy years on September 9th, 1900, and sent in a claim for the amount payable, as he supposed, upon his certificate, viz., $1000, together with certain proofs of age. These proofs were accepted by the defendants as sufficient, and on October 8th, 1900, they sent him, through the officers of his own council, a cheque for $27, expressed to be "for full amount of first instalment of claim under certificate No. 158." The plaintiff returned the cheque on October 13th, 1900, saying that his certificate called for $1000, and he expected that amount. Then the chief secretary, Emory, wrote, returning the cheque, referring the plaintiff to section 262 of the constitution of 1900, and saying that the cheque was made out in full according to that article. He was further told that if he was not satisfied he could appeal to the board of directors, which met on Tuesday, October 30th. On October 29th plaintiff returned the cheque to Emory, asserting his right to the $1000, and his refusal to take less "unless the judge so decides," and concluding, "I now give you notice that I appeal to the board of directors."

This letter was answered by Emory on November 2nd, who pointed out, what he had omitted in his former letter, that the order of the plaintiff's appeals was first to the Dominion councillor, then to the board of directors, and finally to the Dominion council itself, a course which he urged the plaintiff regularly to observe.

The cheque was then sent by Emory to the defendants' manager, upon whom a few days later the plaintiff's son called on the subject of the claim. It was then given to him for the plaintiff. The manager stated that the son said he wished to avoid law, and would accept it. The son denied this, but the cheque appears to have been cashed through the bank on November 8th, 1900. On February 17th, 1901, the plaintiff lodged an appeal with one Lees, the Dominion councillor of the

defendants, "against the amount paid on my disability certificate No. 158. I fail" (he added) "to find any clause in the constitution where the old age claims are to be paid by instalments." His appeal was overruled by Lees' decision, communicated to him by letter on February 25th, in which the writer refers him again to section 262 of the constitution of 1900, which provides, as he informs him, "that claims on the ground of old age are under the regulation provided in section 259 of the total disability law, which provides that payments are to be made in instalments." The plaintiff then writes to the manager threatening action if his claim was not paid at once. The latter replied on February 26th, again warning the plaintiff that he must pursue his appeals through the courts of the order before he had any standing to sue in the civil courts. The plaintiff took no further appeal, and brought his action on March 9th, 1901.

The board of directors meet in the months of January, April, July and October of each year, at such times and places as the board of the Dominion councillors may decide (section 30, p. 12, constitution of 1900). The then next session of th Dominion council would not be held until the third Tuesday in March, 1902 (section 4, *ib.*, p. 4).

The learned Judge held that the defendants had waived the condition as to signature of the certificate. That they had admitted the sufficiency of the proofs of age with which the plaintiff had presented them. That the plaintiff had accepted the cheque on account only of his claim. That the provision as to appeal was, under the circumstances, inapplicable. And, finally, that the plaintiff's rights were governed by the contract and by the constitution of 1896 and not by that of 1900; and that, under the former, the amount to which he was entitled, after giving credit for $27 paid on account, was $243, for which sum, with costs, judgment was directed.

The defendants now appeal.

The first question is, under which constitution the rights of the parties are to be determined—that of 1896 or that of 1900?

The plaintiff relies upon the former, which was in force when his beneficiary certificate was issued; while the defen-

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dants plead and rely upon that which was adopted on March 24th, 1900. Under that of 1896, which was the one in question in the recent case of *Hargrove* v. *These Defendants*: 2 O.L.R. 79, the plaintiff would be entitled, subject to other defences set up by the defendants, to the option of such a benefit as is equal to as many hundredth parts of the full benefit ($1000) as he had contributed dollars to the total disability fund ($27), from July 1st, 1894, to the time of his attaining the age of seventy years: art. 12, sec. 3.

Under the constitution of 1900, section 262, he would be entitled only to the option of such a benefit as is equal to the sum of $4 for each and every dollar he had contributed to the fund from the above date. This would reduce the amount receivable by him to the sum of $108.

By the Act under which the defendants were incorporated, R.S.O. (1877), ch. 167, sec. 4 (now R.S.O. ch. 211, sec. 5), they are empowered from time to time to make by-laws, rules and regulations for the government and for conducting the affairs of the society, and from time to time to alter or rescind such by-laws, rules or regulations. And by article 14 of the constitution of 1896, under which the plaintiff became a member of the society and obtained his beneficiary certificate, it is provided that the constitution may be altered or amended by a two-third vote of the defendants' Dominion council. The validity of the defendants' action in adopting the constitution of 1900 is not impeached.

And by the terms of the certificate, the defendants' agree to pay, not a sum of $1000 absolutely and at all events, but "to pay out of the total disability fund in accordance with the laws governing such fund sums not exceeding in the aggregate $1000, but if less than that amount, sums not exceeding an aggregate equal to $1 for each and every total disability member in good standing."

In *Hargrove's* case, 2 O.L.R. 79, we held that the plaintiff, claiming under the rules payment of the amount of his total disability certificate on the ground that he had attained the age of seventy years, was restricted by the rules of the society to the option of taking the smaller benefit if he did not choose to wait until July 1st, 1914, at which date only, and not earlier,

is a full instalment of the $1000 payable under the constitution of 1896 as well as by that of 1900. And the question now is whether by the rules of a later constitution the amount of the optional benefit which the beneficiary might have taken under the earlier one can be reduced.

I am of opinion that the rights of the parties are regulated by the relative provisions of the later constitution.

The contract is a contract for the insurance of a member of the society; and the member accepts and becomes a party to it on the basis of his membership, and his assent as such to the power of the society by statute and by the rules of the constitution, to make alterations in the rules dealing with the fund out of which any sum which he may ultimately become entitled to, is to be paid. This is the rule to be deduced from the cases of *Rosenburg* v. *Northumberland Building Society* (1889), 22 Q.B.D. 373; *Wilson* v. *Miles Platting Building Society* (1889), 22 Q.B.D. 381; and *Bradburg* v. *Wild*, [1893] 1 Ch. 377, and others which might be referred to.

It is said that to apply Rule 262 of the constitution of 1900 to the plaintiff's beneficiary certificate would be to alter the terms of the contract evidenced by it.

If it were so I should be of opinion that the defendants could not invoke it; and to that effect I expressed myself in the recent cases of *Yelland* v. *Yelland* (1899), 25 A.R. 91; and *Fawcett* v. *Fawcett* (1900), 26 A.R. 335. But the defendants' contract is to pay out of the total disability fund in accordance with the laws governing such fund; and the plaintiff is a member of the society whose contract he accepts, which has power from time to time to make and repeal its by-laws, rules and regulations as already mentioned, and therefore also the rules or laws for the government and regulation of the fund in question.

In *Wilson* v. *Miles Platting Building Society* the plaintiff was an advanced member of the defendant society, and had given a mortgage to secure an advance which had been made him in respect of his shares. He covenanted to pay the society all subscriptions, etc., and to do and perform all acts and things which according to the rules for the time being of the society and the provisions of the vote, should from time to time

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become due and payable. Before the plaintiff came to redeem his mortgage the defendants altered their rules, and the altered rules conferred power on the directors to impose a certain charge on a member paying off advanced shares. It was held that the plaintiff's mortgage was subject to the altered rule. In that case the plaintiff's contract and the provision for redemption refer to the rules "for the time being"; but I gather from the judgment of Cotton, L.J., that this was merely laid hold of as a circumstance shewing that there was really nothing to exclude the new rules from operating upon the plaintiff's security and the rights of the parties under it. After referring to the plaintiff's position as a member of the society differing him from that of an ordinary mortgagor, he said, at p. 382—: "One would, therefore, expect that if new rules should be validly made by those who had the power of making rules, they would affect the rights of both of the society and of the plaintiff under the mortgage. That being so (he adds) what we have really to consider is whether there is anything to exclude the new rules from operating," etc.

In *Rosenburg's* case, 22 Q.B.D. 373, Fry, L.J., said, at p. 380 : — "It is obvious that the rights of the mortgagor must be more or less affected by the contract of membership as well as by the contract of mortgage. It is equally apparent, I think, that the contract of membership carries *in gremio* the right on the part of the society to alter the rules from time to time. That right is given by statute." And in *Bradbury* v. *Wild*, [1893] 1 Ch. 377, it was held by Kekewich, J., that although the mortgage did not refer to the rules 'for the time being,' yet the mortgagor by virtue of his contract, which was one of mortgage and membership combined was covered, by the altered rules, and was therefore not entitled to redeem except upon payment of the proportionate additional levy imposed thereby.

I notice *Smith's* case (1875), 1 Ch. D. 481; and *Gardner* v. *Lucas* (1878), 3 App. Cas. 582, merely to say that they are inapplicable for the reasons mentioned in the *Miles Platting* case. I refer also to *Wright* v. *Huron* (1884), 9 A.R. 411, and to *Re Supreme Legion Select Knights of Canada* (1899), 29 O.R. 708.

I conclude, therefore, that the plaintiff is entitled to recover, if at all, only the reduced amount under Rule 262 of the constitution of 1900. I may add that in *Hargrove's* case the contention I have just dealt with seems to have been open on the facts which appear in the report, but the point was not taken, and the rights of the parties were dealt with solely upon the provisions of the constitution of 1896.

Turning now to the other grounds of defence raised at the trial and on the argument, I think there is nothing in the contention that the plaintiff was bound before action to have exhausted the intricate series of appeals within the society, provided by the rules. If these rules refer to a question of disputed liability upon the certificate, it is plain that they may, and in most cases must, involve a delay of perhaps as much as two years before the beneficiaries can appeal by action to the ordinary courts of the land, for there is first an appeal to the defendants' officer known as the Dominion councillor, secondly, from him to the board to directors, which holds quarterly meetings only—in January, April, July and October in each year, and thirdly, to the Dominion council, which holds biennial sessions only, viz., on the third Tuesday in March of each even numbered year: sections 4, 30, 201. These defendants are by virtue of the Insurance Act, R.S.O. 1897, ch. 203, sec. 2 (42), an insurance corporation, and their certificate an insurance contract within sub-sec. 41 (*a*) (*g*), and by section 80 every lawful claim against an insurance corporation under any such contract shall become legally payable on the expiration of sixty days after reasonably sufficient proof has been presented to the corporation of the happening of the event on which such claim was by the contract to accrue; and any rules, conditions or stipulations to the contrary shall, as against the assured, be void.

The event in this case was the attainment by the plaintiff of the age of seventy years. Of that fact proof was furnished to the defendants, which, as their manager says, they "unfortunately" accepted as being sufficient, and acted upon. The time for payment of whatever sum was legally due upon the certificate began, in my opinion, to run from that time, and the plaintiff was not bound to take any of the

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internal appeals upon the question of the construction of the contract.

As regards the remaining objections, I agree with the learned trial Judge that the defendants having assessed the plaintiff and accepted payment of the assessments on the footing of an existing certificate, and having accepted proofs of claim and paid part on account thereof, are not in a position to set up as a defence that the plaintiff did not actually sign the acceptance of the certificate until after he had attained the age of seventy years.

The plaintiff is not estopped from insisting that the whole of the optional benefit is at once due and payable as this Court has already held, merely by reason of having accepted a cheque which is expressed to be for the full amount of the first instalment thereof. Acceptance of a cheque so worded cannot be extended beyond its exact language, or taken as an admission or agreement that the remainder of the benefit is payable only in three successive yearly instalments.

Mr. Watson further contended that the plaintiff was not entitled to recover because no evidence had been given of the number of the total disability members. That, however, is only necessary, if the clause in the beneficiary certificate relating to it has any meaning at all, when the amount at credit of the fund in the company's coffers is less than $1000.

And that no possible or even shadow of a possible objection to the plaintiff's claim might be omitted, it was also urged that it was not payable except upon production and surrender of the certificate, and it was said that he had refused to surrender it. This objection fails, because the condition calls only for the production *or* surrender of the certificate, and it was produced to and examined by the officials of the company before the cheque signed by them was issued.

Speaking for myself, I think the time has arrived when the Legislature should deal practically and summarily with these benevolent and friendly societies, and should provide a clear set of statutory rules as the only ones they shall have the right to impose on those who insure with them. The complicated, ill-expressed, and constantly fluctuating body of rules which they impose on their members are giving rise, as may be seen

by the law reports, to very expensive litigation, ruinous in many cases to those who are involved in it.

The judgment below must be varied in accordance with the views I have expressed, and reduced to $81 and interest from October 8th, 1900, and the appeal in other respects is dismissed. The plaintiff should have three-fourths of the costs of the appeal.

As regards the cross-appeal,* the question raised was fully considered by us in *Hargrove's* case, and I see no reason to recede from the opinion there expressed. We must follow it in this Court and dismiss the cross-appeal accordingly.

* By way of cross-appeal the respondent contended that the decision of the trial Judge should be varied, and judgment directed to be entered for $1000, less $27 paid on account.—Rep.

A. H. F. L.

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THOMPSON v. THOMPSON.

Evidence—Corroboration—Sufficiency of—Registered Mortgage—Promissory Note —R.S.O. 1897, ch. 73, sec. 10.

In an action on a promissory note against the personal representatives of the maker, tried by a Judge without a jury, a duplicate registered mortgage purporting to be executed by the maker of the note, with the registrar's certificate of registration upon it, was produced in evidence to prove by comparison the signature to the note :—

Held, that the Judge was entitled to compare the signatures, and act on his own conclusion as to their identity, and having found them identical, the corroboration was sufficient to satisfy R.S.O. 1897, ch. 73, sec. 10.

THIS was an appeal from the judgment in this action, which was brought upon a promissory note against the executor and executrix of the alleged maker of it, pronounced on April 1st, 1902, by the Judge of the county court of the county of Peel, in favour of the plaintiff for the amount claimed with costs, upon the following main ground that there was no evidence given or tendered in corroboration of the plaintiff's evidence as required by the statute. The facts of the case are fully stated in the judgment.

The appeal was argued on June 5th, 1902, before FALCONBRIDGE, C.J.K.B., and STREET and BRITTON, JJ.

B. G. Justin, for the defendants, contended that the mortgage produced purporting to be executed by the plaintiff was not of itself sufficient corroborative evidence, and that the Judge had no right to rely upon his personal comparison of the signature on the note with the signature to the mortgage, citing *King* v. *King* (1871), 30 U.C.R. 26 ; *Regina* v. *McBride* (1895), 26 O.R. 639 ; *Tucker* v. *McMahon* (1886), 11 O.R. 718.

E. G. Graham, for the plaintiff, contended that the mortgage produced as it was by the registrar of the county of Peel, with certificate of registration indorsed, was *primâ facie* proof of its due execution, and that the Judge was entitled to compare the signatures and act upon his conclusion as to their identity : *Cobbett* v. *Kilminster* (1865), 4 F. & F. 490 ; R.S.O. 1897, ch. 73, sec. 55.

June 21. FALCONBRIDGE, C.J.K.B.:—The principal question for determination is whether the evidence of the plaintiff was "corroborated by some other material evidence" so as to satisfy the requirements of R.S.O. 1897, ch. 73 (The Evidence Act), sec. 10.

The production of another note, said to have been made by deceased, did not advance the matter at all for plaintiff, for he was the only witness as to the genuineness of that signature, and his oath on that point was not "other material evidence" to corroborate his evidence as to the note sued on.

But the mortgage stands on entirely a different footing. The signature of the deceased to that instrument was identified by the plaintiff, but the document is also an original part on which the registrar has indorsed a certificate of the registration thereof, and so it is to "be received as *primâ facie* evidence of the registration and of the due execution of the same:" R.S.O. 1897, ch. 136, sec. 63.

This furnishes the corroboration required by the statute, provided the learned Judge was entitled to look at the two writings and make comparison thereof for himself. No expert was called to give an opinion.

It is quite plain that the learned Judge did make the comparison, though he does not say so in express terms, and it is equally plain that he was right in coming to the conclusion that the two writings were made by the same hand.

But it was argued before us, manifestly for the first time, that he had no right, in the absence of some expert evidence on the subject, to make the comparison for himself.

The same Evidence Act, R.S.O. ch. 73, sec. 55, provides that "comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine, shall be permitted to be made by witnesses; and such writings and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute."

This section is an exact transcript of sec. 27 of the English Common Law Procedure Act of 1854 (17 & 18 Vict. ch. 125).

In *Cobbett* v. *Kilminster* (1865), 4 F. & F. 490, plaintiff produced a memorandum said to have been written by defendant,

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who denied the handwriting to be his. Henry James, for plaintiff, got defendant to write on a piece of paper a certain date containing several figures of the memorandum the writing of which defendant denied, and soon afterwards Mr. James desired to hand this paper to the jury for the purpose of comparison. Martin, B., doubted, but on being reminded of the provisions of the Common Law Procedure Act, said he could not exclude it.

The above section appeared as sec. 213 of the Common Law Procedure Act of Upper Canada.

A case something like the present came before the Queen's Bench in 1870 (*King* v. *King*, 30 U.C.R. 26). That was an action upon an note; plea *non fecit*. Plaintiff called three witnesses, whose testimony proved nothing relating to the note or the making of it. The note was then produced, and the plaintiff's counsel produced a bond to which was an admitted signature of the defendant. The trial Judge nonsuited the plaintiff, holding that a witness must be called as to the genuineness of the signature of the note sued upon, after which a comparison might be made by the jury. A motion was made in term before Morrison, J., and Wilson, J., and the Court being equally divided the rule dropped. Wilson, J., was of opinion that the statute did not say that the comparison should be made *only* by witnesses, and that the comparison might be made by jurymen themselves without the assistance of witnesses. Morrison, J., was of the contrary opinion; but I think it is quite plain from a perusal of his judgment that if there had been any evidence adduced, either to prove the handwriting of the note or to compare the note with the admitted signature, the nonsuit ought not to have been directed. And he says, at p. 29: "I am not prepared to say that before evidence by comparison is given, a witness should be called to swear to the genuineness of the disputed writing; I only decide that it is not sufficient to hand to the jury a genuine writing and a disputed one."

In *Thompson* v. *Bennett* (1872), 22 C.P. 393, at p. 406, Gwynne, J., thought that "a Judge trying a case without a jury might, with perfect propriety, satisfy his mind by comparison of the signatures to both deeds, of the authenticity of the latter as *primâ facie* evidence thereof."

It seems to me to be quite clear that, on the authority of these cases and on the plain construction of the statute, the learned Judge was well entitled to come to the conclusion that he did upon the evidence before him. The appeal will, therefore, be dismissed with costs.

STREET, J.:—The action here is upon a note purporting to be made by the deceased person whose executors and executrix are the defendants in the action. The signature to the note is denied upon the pleadings. The plaintiff being called as a witness, swore that the deceased had signed it. A mortgage, also purporting to be made by the deceased, was produced, with the county registrar's certificate of its due registration indorsed, but no evidence was given of any comparison of the two signatures.

The defendants' counsel moved for a nonsuit upon the ground that there was no sufficient corroboration of the plaintiff's claim; this objection was overruled, and judgment was given for the plaintiff for the amount of the note. The defendant appeals to the Divisional Court against this judgment, and the main question discussed before us was whether the Judge was entitled to look at the signature to the mortgage for the purpose of comparing it with that to the note, for the purpose of determining whether the latter was a genuine signature. If he was not, then there was no corroboration; if he was, then there was corroboration. In my opinion he was entitled to do so, and the plaintiff's evidence was sufficiently corroborated.

Apart from the statute and the cases referred to by the Chief Justice, it appears to me that both as a matter of principle and of common sense we cannot prohibit a Judge from using his eyes by comparing two signatures in evidence before him when the sole question at issue depends upon a comparison to be made of them; nor tell him that he must be guided not at all by his own senses but by the opinion of any chance witness who may be picked up in Court for the purpose of making the comparison.

I agree that the appeal should be dismissed with costs.

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BRITTON, J.:—I agree with the judgment of my learned brothers.

There are but two points for the consideration of the Court.

1st. Was the plaintiff corroborated as required by R.S.O. 1897, ch. 73, sec. 10?

2nd. Was there any consideration for this note, if given?

As to the first point, there was material evidence other than that of plaintiff, in the mortgage produced, if (*a*) the handwriting of deceased is sufficiently proved by the production of the mortgage from the deceased to Geo. Cordett; and (*b*) if comparison of handwriting—that is to say, comparison of the disputed handwriting of the note sued upon with the handwriting (alleged to be proved to be genuine) on this mortgage—can be made by the Judge.

R.S O. 1897, sec. 55, ch. 73, says: "Comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine, shall be *permitted to be made by witnesses*; and such writings and the evidence of witnesses respecting the same may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute."

Is the handwriting of deceased sufficiently proved by the production of the mortgage under R.S.O. 1897, ch. 136, sec. 63? It is clear that this section—which is in the Registry Act—was never introduced to make an instrument so produced evidence of *handwriting*; and it is only as evidence of handwriting that it will help the plaintiff.

The mortgage might be validly executed, although the signature was put to it without the deceased touching a pen; and, then, it seems to me that the writing proved to be genuine mentioned in ch. 73, sec. 55, means actual handwriting—not writing authorized but actually written by the person in reference to whom writing is disputed.

I come to the conclusion, but with great hesitation, that the production of the mortgage is *primâ facie* evidence of the due execution of it by deceased, and that as it purports to be signed by deceased it may by the Judge be treated as *primâ facie* evidence of his signature, and therefore that this signature may

be deemed to be proved to the satisfaction of the trial Judge to be genuine.

I think the learned Judge had the right to make comparison, and from his finding I must assume that he did make comparison, although he says nothing on either point mentioned by me, but finds clearly and wholly for the plaintiff.

The plaintiff, if he is right, should have given further testimony as to handwriting. It would have been much more satisfactory to all concerned.

The genuine writing and the disputed writing are before the Court—if a comparison had been made by witnesses that evidence would also be before the Court—but the absence of evidence by witnesses does not remove the documents: see Taylor on Evidence, 8th ed., par. 1870, and the cases there cited.

There was, therefore, material evidence other than that of plaintiff in support of plaintiff's claim.

If this evidence was sufficient as to the making of the note, it was also sufficient as to consideration.

The learned county court Judge has considered it sufficient on both points.

A. H. F. L.

[DIVISIONAL COURT.]

D. C.
1902
July 12.

McIntyre v. The Corporation of the Town of Lindsay et al.

Municipal Corporations—Negligence — Gas Company—Joint Liability — Non-Repair—R.S.O. 1897, ch. 199, sec. 26—Ib. ch. 223, sec. 606.

A municipal corporation having placed a barrier round a portion of the side-walk which they were repairing, the plaintiff at night going round, fell into a trench dug by a gas company, with consent of the corporation, under an agreement for indemnity and to properly warn and protect the public. No lights were put up by either defendant. The plaintiff brought this action against both for injuries sustained :—

Held, that both the defendants were liable to the plaintiff, the corporation for non-repair and not warning the public, and the gas company under their special contract with the corporation and under R.S.O. 1897, ch. 199, sec. 26, but that the corporation should have judgment over against the company.

Appeal by the plaintiff from the judgment of the Judge of the county court of the county of Victoria, dismissing the action against the corporation of the town of Lindsay with costs, and ordering judgment to be entered for the plaintiff against the Lindsay Gas Company for $75 with costs.

The action was brought by the plaintiff against both the above defendants to recover damages owing to his having on the night of October 9th, 1901, stepped into a deep trench dug by the defendants, the gas company, along one of the streets of the town of Lindsay.

The defendants, the gas company, had been authorized by a by-law of the municipal council of the town of Lindsay to lay down their mains along the streets of the town, they agreeing to indemnify the town corporation for all damages to arise therefrom, and to properly protect and warn the public against accidents by lights, etc. At the same time that the gas company had opened a trench at the point in question, the town corporation were laying a granolithic walk, and had erected a barrier around the walk usually used by pedestrians. The plaintiff was deflected from the usual path by this barrier, and stepped in the dark into the ditch and was injured. Neither of the defendants had put up any lights at the point in question, and the street itself was dark. It appeared that on previous nights the gas company had hung lamps along the excavation to warn persons of its existence.

The learned Judge considered that the defendants, the town corporation, were not guilty of negligence, because he thought they were justified in supposing that upon the night in question the gas company would light the excavation as they had been in the habit of doing. He, therefore, dismissed the action against them with costs, but gave judgment for the plaintiff against the defendants, the gas company, with costs, assessing the damages at $75. The plaintiff appealed, asking that judgment should be given against both defendants, and that the damages should be increased to $200.

The appeal was argued before the Divisional Court (FALCONBRIDGE, C.J.K.B., STREET and BRITTON, JJ.), on June 3rd, 1902.

W. Steers, for the appeal, referred to R.S.O. 1897, ch. 199, secs. 5, 17, 22, 27; *ib.* ch. 223, sec. 606; *Pickard* v. *Smith* (1861), 10 C.B.N.S. 470; *Hardaker* v. *Idle District Council*, [1896] 1 Q.B. 335, at p. 351; *Hill* v. *New River Co.* (1868), 9 B. & S. 303; *Homewood* v. *City of Hamilton* (1900), 1 O.L.R. 266; Beven on Negligence, 1st ed., p. 76.

H. L. Drayton, for the respondents, referred to *Keachie* v. *Corporation of City of Toronto* (1895), 22 A.R. 371; *Atkin* v. *City of Hamilton* (1897), 24 A.R. 389.

July 12. STREET, J. [after stating the facts as above]:—The action appears to be properly brought against both the town corporation—whose duty it was to keep the highway in repair—and the gas company, who had dug the trench: *Stilliway* v. *Corporation of City of Toronto* (1890), 20 O.R. 98.

An absolute duty was cast upon the town corporation by sec. 606 of the Municipal Act, R.S.O. 1897, ch. 223, to keep the highway in repair, and they could not divest themselves of this duty by requiring the gas company to assume it. The gas company had no right to dig up the highway without the authority of the by-law passed by the town corporation, and in giving that authority the town corporation did not free itself from its statutory liability. There is nothing in sec. 611 of the Municipal Act which applies here, because the gas company was acting with the consent and license of the corporation.

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It is plain from the evidence that the highway was out of repair to the knowledge of the town corporation, and that the accident was caused by such non-repair and by the negligence of both defendants to see that the trench was lighted at night so as to warn the public of the danger. The liability of the defendants, the town corporation, to warn the public was a duty they owed to the public, and the liability of the other defendants, the gas company, to the town corporation, was under their special contract made when they obtained leave to break up the streets; and their liability to the public is declared by sec. 26 of R.S.O. 1897, ch. 199.

The result is that both the defendants are liable to the plaintiff for the injuries he has sustained, and there should be judgment against them for the amount, $75 with costs; and the defendants, the town corporation, should have judgment over against the defendants, the gas company, for the amount so recovered and the costs of the plaintiff in this action, and also their costs of defence in this action. The plaintiff should be paid the costs of the present appeal by the defendants, the town corporation, but the town corporation should not recover the costs of the appeal over from the gas company.

There will be no costs of the appeal to the defendants, the gas company, as they did not appear separately from their co-defendants upon the motion.

FALCONBRIDGE, C.J.:—I agree. The case of *Dallas* v. *The Town of St. Louis* (1902), 32 S.C.R. 120, 11 R.J.Q. (K.B.) 117, to which we have been referred since the argument, appears to have been decided under the provisions of the special statute of Quebec, 59 Vict. ch. 55, and of Articles 1053 and 1054 of the Code.

BRITTON, J., also concurred.

A. H. F. L

[DIVISIONAL COURT.]

WILDER V. WOLF.

D. C.
1902
July 7.

Sale of Goods—Fraudulent Second Sale after Payment by First Purchaser—Cheque—Stoppage of—Money in Court.

A vendor of goods, after receiving payment therefor, fraudulently sold them to another purchaser who bought in good faith, giving his cheque in payment. This cheque was drawn on a bank at T., but cashed at a bank in O., on payment being guaranteed by an endorser. The second purchaser, on being served with garnishee proceedings by the first, stopped payment of the cheque, and paid the amount into Court. The endorser, meanwhile, paid the bank at O., and now claimed the money in Court :—

Held, that he was entitled to it.

APPEAL by the primary creditor from judgment in the 10th division court of York dismissing his claim against the garnishee, and ordering payment to the claimant of the money in Court.

The action was brought by one Wilder against one Wolf to recover $150 advanced by Wilder to Wolf by three cheques of $50 each.

The evidence shewed that the amount had been advanced in part payment of a car-load of junk to be delivered by Wolf to Wilder, and that Wolf having received the money, instead of delivering the car-load to Wilder according to promise, sold it to Mehr instead. Mehr bought in good faith, and gave his cheque for $205 in payment to Wolf, the cheque being drawn on the Bank of Ottawa in Toronto. Wolf took it to the Canadian Bank of Commerce at Orangeville and asked them to cash it, which they did upon the claimant Taylor guaranteeing payment by his indorsement. Before the cheque was presented at the Bank of Ottawa in Toronto, the present action had been brought, and Mehr had been served with garnishee proceedings. He at once stopped payment of the cheque, and it was refused by the Bank of Ottawa, and was duly protested for non-payment. Then Mehr, having stopped payment of the cheque, paid the amount of it into Court under the garnishee proceedings in this action. The Canadian Bank of Commerce at Orangeville having the cheque thrown back on them, called

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upon Taylor for payment, and he paid it, and now claimed the money in Court to recoup himself.

The primary debtor denied that he owed the primary creditor the amount, and swore that the three cheques for $150 were to be applied upon a running account between him and Wilder.

The learned Judge sitting in the division court (Morson, Co.J.) gave judgment for Wilder against Wolf for the $150 and costs; he dismissed Wilder's claim against Mehr the garnishee, and ordered that the money in Court should be paid to Taylor the claimant.

The primary creditor appealed, and his appeal was argued in the Divisional Court before FALCONRRIDGE, C.J.K.B., and STREET and BRITTON, JJ., on June 5th, 1902.

E. E. A. Du Vernet, for the plaintiff, contended that the cheque not having been marked, and the money having been paid into Court in answer to the summons, the plaintiff was entitled to succeed, as the garnishee admitted the debt, and therefore the claimant had no standing here: *Cohen* v. *Hall* (1878), 3 Q.B.D. 371; *Elwell* v. *Jackson* (1884), 1 C. & E. 362; that a cheque is an unaccepted bill of exchange: *Hall* v. *Prittie* (1890), 17 A.R. 306; Harvard Law Rev., vol. 2, p. 548; that the claimant was not even a holder for value.

L. V. McBrady, for Mehr the garnishee, contended that *Cohen* v. *Hall* was distinguishable, because the cheque there was past its maturity; that a cheque is a negotiable instrument, and at the time of service of the garnishee notice the cheque in question was outstanding in the hands of a third party for value, and therefore the judgment was right.

A. A. Hughson, for Taylor the claimant, contended that the Canadian Bank of Commerce became holder for value, and the claimant having settled with them, stood in their position: *McLean* v. *Clydesdale* (1883), 9 App. Cas. 95; *Ex parte Richdale* (1882), 19 Ch. D. 409, at p. 414; *First National Bank of Rochester* v. *Harris* (1871), 108 Mass. 514; Addison on Contracts, 8th ed., p. 1202; that, moreover, the debt was not due to the defendant alone, and if so, was not garnishable: *Parker* v. *Odette* (1894), 16 P.R. 69; *Macdonald* v. *The*

Tacquah Gold Mines Company (1884), 13 Q.B.D. 535. He also cited *Parker* v. *McIlwain* (1896), 17 P.R. 84.

DuVernet, in reply, contended that the moment the garnishee stopped payment, the suspension of the remedy ceased, and the debt remained as though the cheque had never been given.

July 7. The judgment of the Court was delivered by STREET, J.:—In my opinion justice is done to all parties by the judgment appealed against, and it should be upheld.

Mehr gave his cheque to Wolf for the amount of his purchase, $205, in good faith; the cheque was a negotiable security, and it passed into the hands of the Canadian Bank of Commerce in due course as indorsers for value. Mehr, upon being made aware of Wilder's position, did his best to help him by stopping payment of the cheque; he could not have been held liable to pay the money over again to Wilder after once he had given his cheque for the amount to Wolf; he shewed his good faith in the matter, but hardly acted wisely in paying the amount of the cheque he had given into Court, for he still remained liable upon his cheque to any *bonâ fide* holder for value. The Canadian Bank of Commerce, however, who had become the holders, instead of looking to him, as drawer, for payment, had recourse to Taylor the indorser, and he at once paid the amount, and he is now in the position of holder of the cheque. If the money in Court were to be paid out to the primary creditor, as asked in the present appeal, then Mehr, who paid it in, would be liable to pay it over again to Taylor; while if the judgment appealed against is allowed to stand, the cheque in the hands of Taylor will be satisfied by the payment out of Court to him of the money which Mehr paid in.

Nothing stands in the way of this but the conclusion usually to be drawn from the fact of payment into Court by a garnishee of the amount claimed from him, that he admits his indebtedness. Here, however, all the facts and all the parties are before us, and it is plain that justice has been done to all without infringing any rule of law.

The appeal should be dismissed with costs.

A. H. F. L.

[IN CHAMBERS.]

1902

July 15.

McGILLIVRAY v. WILLIAMS.

Lis Pendens—Vacating—Registration of Order Vacating—Judicature Act—R.S.O. 1897, ch. 51, secs. 98, 99.

A party by whom or for whose benefit a *lis pendens* has been registered, may obtain *ex parte* an order vacating it, and may register such order at any time.

Secs. 98 and 99 of the Judicature Act, R.S.O. 1897, ch. 51, as to applications for orders vacating a *lis pendens* upon non-prosecution of the action, and giving the right to register such orders only after the expiration of fourteen days from their making, apply only when the *lis pendens* has been registered by an opposite party.

THIS was an appeal by the defendant from an order of the local Judge at London, dated April 5th, 1902, vacating, on the *ex parte* application by the plaintiff, the certificate of *lis pendens* registered by him, and an application by the defendant to vacate the registration of the order.

The appeal was argued before MEREDITH, C.J.C.P., on the 19th day of May A.D. 1902.

F. A. Anglin, for the appellant.
W. E. Middleton, for the respondent.

July 15. MEREDITH, C.J.:—Counsel for the appellant contended that the order was improperly made *ex parte*, and that the registration of it having been effected within fourteen days after it was made, was also improper, and he relied on secs. 98 and 99 of the Judicature Act, R.S.O. 1897, ch. 51, in support of his contention.*

* R.S.O. 1897, ch. 51, sec. 98 (1). Where a certificate of *lis pendens* has been registered, and the plaintiff or other party at whose instance the certificate was issued, does not in good faith prosecute the litigation, the Court or Judge may at any time during the litigation make an order vacating the *lis pendens*.

(2) . . .

(3) . . .

(4) . . .

Sec. 99. The order for vacating or annulling a certificate of *lis pendens* . . may be registered . . . on or after the fourteenth day from the date of the order, unless a Judge . . postpones or forbids the registration.

I am unable to agree with either contention. The registration of the certificate of *lis pendens* was a proceeding taken by the respondent for his own benefit and protection, and I do not see why he might not get rid of it whenever he saw fit to do so; he certainly might have discontinued his action, and in that case the same result would have followed as flows from the order which he obtained vacating the certificate of *lis pendens*.

I agree with Mr. Middleton's contention that secs. 98 and 99 are applicable only when the party seeking to vacate the certificate is not the person by whom and for whose benefit it has been registered — in other words, that the sections are intended to provide a remedy for one against whose lands a certificate has been registered where the opposite party does not proceed with the action in good faith, or any other just ground exists for annulling the registration.

The appeal and motion must, therefore, be dismissed with costs.

A. H. F. L.

[IN CHAMBERS.]

1902
Aug. 21.

LINCOLN PROVINCIAL ELECTION.

MCKINNON V. JESSOP.

Petition—Misdescription of Electoral District—Surplusage—Amendment.

The petition and other proceedings in an election case were headed in the proper Court, and purported to be under The Ontario Controverted Elections Act, as to the "Election of a member of the Legislative Assembly for the Province of Ontario for the electoral district of Lincoln and Niagara, holden on the 22nd and 29th days of May, 1902." No such provincial electoral district as Lincoln and Niagara existed, but there was an electoral district for Lincoln, being the district intended:—

Held, that the misdescription was not fatal; that the additional words might be treated as surplusage and struck out, leave being given to the petitioner to make such amendment.

THIS was a motion by the respondent to set aside the presentation of the petition and all subsequent proceedings for defect or irregularity in the entituling of the petition and other papers.

The election was held on the 29th May, 1902, in which Elisha Jessop was the successful candidate and D. J. McKinnon the defeated candidate.

The motion was heard before OSLER, J.A., in Chambers, on August 20th, 1902.

W. D. McPherson, for the motion.

R. A. Grant, contra.

August 21. OSLER, J.A.:—Motion by the respondent to set aside the presentation of the petition and all subsequent proceedings for defect or irregularity.

The petition, affidavit of *bona fides* and other proceedings, are entituled: "In the Court of Appeal for Ontario. The Ontario Controverted Elections Act. Election of a member of the Legislative Assembly of the Province of Ontario for the electoral district of Lincoln *and Niagara*, holden on the 22nd and 29th days of May A.D. 1902."

The objection is that there is no such provincial electoral district, and therefore that there was no such election as that petitioned against. There is no Ontario electoral district of

Lincoln and Niagara, or Niagara. There is an Ontario electoral district of Lincoln.

Mr. McPherson contends that the mistake is fatal to the petition. Mr. Grant, while not admitting this, moves *ore tenus* to amend. This is objected to, and it is urged that I have no power to make or direct such an amendment.

Section 3 of the Ontario Controverted Elections Act enacts that a petition complaining of the undue return or undue election of a member may be presented to the Court by, *inter alia*, some person who was a candidate at such election.

Rules of Court passed in pursuance of the Act provide: (2) that an election petition shall contain the following statements (*a*) the right of the petitioner to petition as defined by the Act; (*b*) the holding and result of the election, and a brief statement of the facts and grounds relied upon, and a prayer for the relief claimed, etc.

Rule 4 prescribes the form, or what shall be a sufficient form, of a petition, which shews that the place or electoral district for which the election petitioned against was held, is to be stated in the title. The form is followed in the present instance, though the place is misdescribed, or, as the respondent contends, a non-existent place or electoral district is mentioned.

I can take judicial notice of the fact that a general provincial election was held in the month of May last, and that a person named Elisha Jessop was returned as having been duly elected thereat to represent the electoral district of the county of Lincoln in the Legislative Assembly of the Province: *Ontario Gazette.*

The affidavit of the respondent filed in support of the motion shews that he is that person.

The petition itself and the affidavits filed in support of the motion shew that it was not presented in respect of an election to a Dominion constituency, though there happens to be an electoral district of Lincoln and Niagara for the purpose of a Parliamentary or Dominion election.

The petition having been presented in respect of a provincial election, there having been at the time mentioned in the petition an election for the electoral district of Lincoln at which the respondent was elected, and there being no electoral district

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of Lincoln *and Niagara* or Niagara, I think the words "and Niagara" used in describing or stating the place or electoral district for which the election complained of was holden and the respondent elected, ought to be regarded as being merely surplusage, or at most, a harmless misdescription, not fatal to the proceedings even in the absence of an amendment.

Mr. McPherson contended that the case was the same as if the petition had stated the county of York or some wholly unrelated or unknown region as the place for which the respondent had been elected. Such a case may be left to be dealt with when it arises. Here the electoral district of Lincoln was evidently intended, and is mentioned, though inapt or inofficious words have been added.

All the proceedings are before me, and, subject to the provisions of the Act, I have the same power to amend them, if necessary, as if they were in an action in the High Court of Justice. And as I see nothing in the Act or rules which forbids me to exercise that power in the case before me, I give the petitioner leave to amend accordingly.

I do not think it necessary to say more about the cases of *Maude* v. *Lowley* (1874), L.R. 9 C.P. 165, or *Aldridge* v. *Hurst* (1876), 1 C.P.D. 410, 417; *Norwich* Election (1886), 80 L.T. Jour. 253, which are always cited on applications of this kind, and in which leave to amend was refused, than that they do not touch a case like this. They merely decide that an amendment which in effect seeks to make a new petition will not be allowed after the time for filing the petition has expired.

The petitioner taking an order to amend by striking out of the proceedings the words "and Niagara," I dismiss the application. The costs will be costs in the cause to the respondent in any event, and over and above any other costs which he may ultimately become entitled to.

G. F. H.

[DIVISIONAL COURT.]

MIDDLETON V. SCOTT.

D. C.
1902
July 31.

Mortgage—Amount due—Waiver of Tender—Rate of Interest after Maturity of Mortgage—Costs.

Prior to the maturity of a mortgage, the mortgagor's solicitor wrote to the mortgagee's solicitor, that if he would call at the former's office he could have the principal and interest then due, naming the correct amount, and on the mortgagee's solicitor failing to call, he wrote to the mortgagee that he was prepared to pay the said sum ; this was answered by the mortgagee's solicitor sending a statement claiming in addition subsequent interest and certain disputed costs:—

Held, that what took place did not amount to a waiver or dispensation of a tender of the amount due under the mortgage.

The payment of the principal money was by the terms of the mortgage to be made at the expiration of a named period, with interest at a specified rate, as well before as after maturity, until the principal was fully paid and satisfied :—

Held, that interest at the rate specified was payable after as well as before the expiration of such period.

Peoples' Loan and Deposit Co. v. *Grant* (1890), 18S. C.R. 262, distinguished.

In an action for redemption, in which the above alleged tender was set up, the judgment was for a reference to the master to ascertain the amount due, to make all necessary enquiries for redemption or foreclosure and to report special circumstances, the provision as to costs being that if the mortgagor should make default in payment of the amount, if any were found to be due, he should pay the costs, and if no greater sum than the above amount was found to be due the defendant should pay the costs. Further directions were not reserved ; nor were there any further directions as to costs :—

Held, that the defendant was entitled to the costs of the action.

Judgment of Street, J., varied.

THIS was an appeal by the plaintiffs, and cross-appeal by the defendant from the judgment of Street, J. reported in 3 O.L.R. 27, where the facts so far as material are set out

The appeal was heard on May 6th, 1902, before a Divisional Court composed of MEREDITH, C.J.C.P., and MACMAHON, J.

Matthew Wilson, K.C., and *J. B. O'Flynn*, for the appellants. The plaintiff's solicitor had the money with him ready to pay it over. What took place was tantamount to the mortgagee saying that it was useless to tender the money, as it would not be received unless the costs were also paid. The authorities shew that what took place here amounted to a waiver or dispensation with a tender: *Black* v. *Allen* (1866), 17 C.P. 248; *Kirton* v. *Braithwaite* (1836), 1 M. & W. 310; *Moffat* v. *Parsons* (1814), 5 Taunt. 307 ; *Llado* v. *Morgan*

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(1874), 23 C.P. 517, 531; Fisher on Mortgages, 5th ed., sec. 1503; *Jones* v. *Tarleton* (1842), 9 M. & W. 675; *Kerford* v. *Mondel* (1859), 28 L.J.N.S. Ex. 303; *Cornwall* v. *Brown* (1852), 3 Gr. 633; *Black* v. *Smith* (1791), 1 Peake N.P. 121; *Cole* v. *Blake* (1793), 1 Peake N.P. 238; *Dirks* v. *Richards* (1842), 4 M. & G. 574; *Souter* v. *Burnham* (1863), 10 Gr. 375; *Greenwood* v. *Sutcliffe*, [1892] 1 Ch. 10; *Weeks* v. *Goode* (1859), 6 C.B.N.S. 367; *Scarfe* v. *Morgan* (1838), 4 M. & W. 270; *Allen* v. *Smith* (1862), 12 C.B.N.S. 638.

W. E. Middleton, for the respondent. There never was a production of the money nor any offer to pay it over so as to constitute a tender, and nothing was done on the part of the mortgagee's solicitor to dispense with a tender. The mere fact of the solicitor demanding payment of the costs of the sale proceedings would not dispense with the tender: *Matheson* v. *Kelly* (1875), 24 C.P. 598: *Powney* v. *Blomburg* (1844), 8 Jur. 746; *Thomson* v. *Hamilton* (1836), 5 O.S. 111; *Thomas* v. *Evans* (1808), 10 East 101; *Harding* v. *Davies* (1825), 2 C. & P. 77; *Douglas* v. *Patrick* (1790), 3 T.R. 683; *Glasscott* v. *Day* (1803), 5 Esp. 48; *Lockridge* v. *Lacey* (1870), 30 U.C.R. 494; *Ex p. Danks, Re Farley* (1852), 22 L.J.N.S. Bank. 73; 2 D.G. M. & G. 936; *Howell* v. *Listowell Rink, etc., Co.* (1887), 13 O.R. 476; *Long* v. *Long* (1870), 17 Gr. 251. Then as to the cross-appeal by the defendants. The defendant was entitled to the interest at the same rate after the maturity of the mortgage as prior thereto. Under the clause in the mortgage the plaintiff is entitled to subsequent interest at such rate. As to the costs. The plaintiff is entitled to the costs of the action; Rule 756 expressly provides that on a reference under a judgment the costs shall be taxed. There must be misconduct to deprive the mortgagee of his costs: *Cotterell* v. *Stratton* (1873), L.R. 8 Ch. 295; *Stark* v. *Reid* (1895), 26 O.R. 257.

Wilson, in reply. Interest at the rate specified in the mortgage should be payable up to the maturity of the mortgage; after that date only interest at the legal rate can be charged: *Peoples' Loan and Deposit Company* v. *Grant* (1890), 18 S.C.R. 262. The costs incurred were quite unnecessary, and were properly disallowed.

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July 31. MACMAHON, J.:—Appeal by the plaintiffs from the judgment of Street, J., 3 O.L.R. 27, where the facts are fully set out. There is also a cross-appeal by the defendant (mortgagee) from so much of the said judgment as precludes the defendant from having the costs of the action; and also on the ground that the learned Judge erroneously construed the mortgage in question so as to deprive the mortgagee of interest *post diem* as therein stipulated for.

It was not contended by counsel for the plaintiff that any tender of the amount due for principal and interest on the mortgage, $396.48, was ever tendered to Mr. White, the agent and solicitor of the defendant; but his argument was that the conduct of the solicitor in claiming from the plaintiff $8.13 in connection with some alleged proceedings under the power of sale in the mortgage, in addition to the principal and interest, amounted to a dispensation with the tender.

Lord Justice Knight Bruce put very tersely and clearly what will constitute a "dispensation with a tender," in *Ex parte Danks, Re Farley*, 22 L.J.N.S. Bank. 73, at p. 75, where he said: "That to constitute a legal tender the money must be there, and must be produced and seen, but with the exception, that the party to whom a tender is made may by his conduct relieve the debtor from the necessity of producing it, by saying that it need not be produced, for he will not take the money if it be." (Cited in *Howell* v. *Listowell Rink, etc., Co.*, 13 O.R. 476, at p. 498.)

Counsel for the plaintiff referred to par. 1503 of Mr. Fisher's work on Mortgages, 5th ed., where the rule of law as to tenders is thus stated: "The conduct of a creditor may amount to a dispensation with the tender. This will not be the consequence of a mere claim of more than is due; but if claiming too much, or setting up two different claims, one of which is wrongful, he so conducts himself as to shew that a tender of the amount properly due would not be accepted, it will be a dispensation." The author refers to *Scarfe* v. *Morgan*, 4 M. & W. 270; *Kerford* v. *Mondel*, 28 L.J.N.S. Ex. 303; and *Jones* v. *Tarleton*, 9 M. & W. 675.

The defendant in each of the above cases claimed a lien, and in each case the money was in the possession of the person

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owning the property, who offered to pay the amount rightly due, which was refused.

In *Jones* v. *Tarleton*, 9 M. & W. 675, there was evidence that the plaintiff produced a bag of sovereigns and offered to pay the freight for a cargo of pigs which the defendant's agent refused to deliver unless a further sum of £5 in respect of an old balance was also paid. This plaintiff refused to pay, denying it was due. No precise amount, however, was actually tendered.

The Court (Parke and Alderson, B.B.) held that the jury having found that the defendant was not entitled to demand the £5 as payment of freight on a former account, that must be considered as a waiver of any tender of the precise sum really due, and which the plaintiff was ready to pay. It was equivalent to saying to the plaintiff, "Do what you will, tender what you will, it is of no use; I will not receive it unless you pay the old account also."

In *Kerford* v. *Mondel*, 28 L.J.N.S. Ex. 303, the defendant claimed to detain goods for two causes of lien, viz., "freight for carriage" and "dead freight," and refused to deliver unless both were paid.

According to the head note, the freighterer (the plaintiff) having, when he demanded the goods, been prepared to pay freight for carriage, and the ship-owner having refused to deliver except on payment of the dead freight, and it being decided that freight for carriage alone was due, it was held that the refusal was an implied dispensation of tender of the freight for carriage.

In that case the plaintiff's clerk had money, and told the defendant he had it to pay freight for carriage at the time the defendant refused to deliver the goods.

Bramwell, B., said, in delivering judgment, at p. 306: "We conclude that the defendant here, in effect, said, 'I claim these goods in respect of the lien for two different items; you need not trouble yourself to tender one of them, because if you do so I shall not deliver them up: I shall keep them for the other.' If that is so, it is a reasonable thing to shew that he dispenses with what he owned would be a nugatory tender of the sum he was entitled to receive."

In *Llado* v. *Morgan*, 23 C.P. 517, a warehouseman had a lien on goods for storage, and claimed also to hold them for an untenable claim, and it was held that did not dispense with a tender of the sum properly due and payable.

Hagarty, C.J., in delivering the judgment of the Court, said, at p. 531: "The state of the authorities seems to result in this, that unless the evidence fairly warrants the conclusion that the demand of a larger sum, or the asserting of other grounds of detention, amount to an announcement that it is useless to tender any smaller sum, or any sum . . . properly due and claimed, as it would be refused, and thereby amount to a dispensing with the tender, the evidence of conversion will not be complete."

There is nothing in the evidence or correspondence that would warrant the conclusion that a tender of the principal and interest was dispensed with. It is true the plaintiff's solicitor wrote to the defendant's solicitor and to the defendant herself, stating that he was prepared to pay $396.48, but he never went to either of them with the money and offered to pay it. And the claim of the solicitor for the $8.13, the costs of the alleged proceedings under the power of sale, could by no possibility dispense with a tender of the amount due on the mortgage.

There being no tender and no dispensation with a tender, the interest continues to run. In addition to the authorities cited by my learned brother Street on this point, I would refer to Robbins on Mortgages, 1897, pp. 710-711, where the author says: "A mortgagor . . must . . make on the appointed day a strict tender of the moneys due, or the Court cannot stop the interest from running, though the circumstances of the case may be such that the Court might wish to do so." *Sentance* v. *Porter* (1849), 7 Hare 426; *Williams* v. *Sorrell* (1799), 4 Ves. 389.

I am unable to agree with the view of my brother Street as to the costs, and as to the rate of interest to be allowed *post diem* on the principal sum secured by the mortgage. As I read the judgment pronounced at the trial, the costs are dealt with by it in the event that has not happened. Subject to the provisions of the 7th paragraph, which provided for the event

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in which the defendant is to pay the costs of the action—which does not apply, as that event has not happened—the direction contained in paragraph 4 appears to me to provide for the costs of the defendant being taxed to him, and besides this, Con. Rule 756 directs that upon a reference under a judgment for redemption without any special direction, the costs of the defendant shall be taxed, etc.

It is true that by paragraph 3 the Master is directed to report specially his findings on all matters relating to the alleged tenders or excuses for tender and to any matters affecting the question of costs, but as the question of costs is not reserved to be afterwards dealt with, this direction appears to be an inconsequential and useless one, and in any case is, I think, insufficient to control the direction contained in paragraph 4 to tax costs, and the provision of Con. Rule 756 that they shall be taxed to the defendant.

I am, therefore, with respect, of opinion that my brother Street's view that the cost of the action, except in the event mentioned in paragraph 7, are not dealt with by the judgment is erroneous, and that under the terms of the judgment in the event that has happened, the defendant is entitled to the costs of the action.

The rate of interest reserved by the mortgage is eight per cent. per annum, and the terms of the proviso for redemption are that the mortgage is to be void on payment of $300, "with interest annually at eight per cent. per annum, as follows, that is to say: the said sum of $300 at the expiration of five years from the date of these presents and interest thereon, and upon all arrears, if any, of interest from the date hereof at the rate aforesaid yearly, and as well after as before maturity, until the said principal sum and interest are fully paid and satisfied."

The provision that interest is to be paid at the rate of eight per cent. per annum after maturity appears to me to mean after the principal money has become payable, that is to say, after the expiration of the five years as well as before, and in that view of its meaning there is no room for the application of the principle applied to such cases as the *Peoples' Loan and Deposit Company* v. *Grant*, 18 S.C.R. 262, where the interest at the rate fixed by the mortgage was to be paid until

the principal money and interest should be fully paid and satisfied, and it was held that the meaning of this provision was that interest should be paid at the agreed rate until the time fixed for payment of the principal money. In the present case such a construction of the proviso for redemption is excluded by the provision that interest at eight per cent. is to be paid after the maturity of the principal sum—in other words, after the principal sum has, according to the terms of the proviso, become payable.

For the reasons I have mentioned, I am of opinion that the plaintiff's appeal should be dismissed with costs, and the defendant's cross-appeal allowed with costs, and that the judgment of my brother Street be varied by directing the interest on the whole $324 to be calculated at the rate of eight per cent. per annum, and the defendant's costs of the action to be added to the principal and interest.

MEREDITH, C.J., concurred.

G. F. H.

[DIVISIONAL COURT].

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June 16.

DAVIS v. HURD.

Costs—Taxation—Costs of Some Issues to Plaintiff, of Others to Defendant—Action for Slander—Apportionment.

Where in an action for damages for four alleged slanders, the judgment was that "the plaintiff do recover against the defendant in respect to the matters set forth in the 3rd and 5th paragraphs of the statement of claim the sum of $1 and costs to be taxed," and that "the defendant do recover from the plaintiff in respect of the matters set forth in the 4th and 6th paragraphs of the statement of claim his costs to be taxed:"—

Held, that the plaintiff was entitled to the general costs of the cause, except such as were occasioned by the causes of action upon which he failed, and the defendant to the costs of the issues upon which he succeeded, the latter being set off.

Sparrow v. *Hill* (1881), 7 Q.B.D. 362, 8 Q.B.D. 479, followed.

Leave to appeal refused.

APPEAL by the defendant from a decision of Meredith, C.J.C.P., upon a question of taxation.

The action was for damages for slanders charged in four paragraphs of the statement of claim, to have been uttered on four separate occasions. The jury found $1 damages for the plaintiff upon the slanders alleged in the 3rd and 5th paragraphs; the plaintiff failed to prove those alleged in the 4th and 6th paragraphs, and the verdict was entered for the defendant in respect of them. The formal judgment was as follows: "That the plaintiff do recover against the defendant in respect of the matters set forth in the said 3rd and 5th paragraphs of the statement of claim the sum of $1 and costs to be taxed," and "that the defendant recover from the plaintiff in respect of the matters set forth in the said 4th and 6th paragraphs of the statement of claim his costs to be taxed."

The taxing officer at Stratford taxed to the plaintiff the general costs of the cause, except so much of them as were occasioned by the causes of action upon which he failed, and to the defendant only the costs of the issues upon which he succeeded, the latter being set off. The defendant appealed to the Chief Justice of Common Pleas in Chambers, contending that the plaintiff was entitled to recover one-half only of the costs of the action, against which he. the defendant, was entitled to set off one-half his costs of defence.

The learned Chief Justice, after consulting the taxing officer at Osgoode Hall, dismissed the appeal with costs.

The defendant then appealed to the Divisional Court, and the appeal was argued before FALCONBRIDGE, C.J.K.B., and STREET and BRITTON, JJ., on June 6th, 1902.

Lally McCarthy, for the defendant, contended that there should be an apportionment of the costs, and that the plaintiff was entitled to half the general costs, and to the costs incidental to the two counts on which he succeeded, and so with the defendant: Seton on Decrees, 6th ed., vol. 1, pp. 248-9, 264; *Begbie* v. *Fenwick* (1871), L.R. 6 Ch. 869; *Knight* v. *Purssell* (1880), 49 L.J. Ch. 120; *Jenkins* v. *Jackson*, [1891] 1 Ch. 89, at p. 96; *Harley* v. *Hunt*, W.N. 1887, p. 184; that no matter what the intention may have been, the order as issued must be followed.

C. A. Moss, for the plaintiff, contended that the question was which of the two practices in use in England was to be followed here, that in the Chancery Division or that in the King's Bench Division: Morgan on Costs, at p. 128; *Sparrow* v. *Hill* (1881), 7 Q.B.D. 362, 8 Q.B.D. 479; that in common law actions apportionment was unknown, although a plaintiff might be deprived of or have to pay the costs of issues on which he failed: Borden's Law of Costs at pp. 163-4; that the cases cited by the appellant were all in the Chancery Division and under the Chancery practice; and that in this country the principle of *Sparrow* v. *Hill* has been followed: Holmested and Langton's Judicature Act, at p. 1257.

McCarthy, in reply, referred to Morgan on Costs, at p. 129.

June 16. The judgment of the Court was delivered by STREET, J.:—The form of the judgment in this case seems to me not to be distinguishable in substance from that which was considered in *Sparrow* v. *Hill* by the Queen's Bench Division in England, reported at 7 Q.B.D. 362, and by the Court of Appeal, 8 Q.B.D. 479; and I think we should follow the judgment of the Court of Appeal there in holding that the taxing officer at Stratford has adopted the proper mode of taxing the costs of the parties under the judgment in question.

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The appeal should be dismissed with costs.

[Leave to appeal to the Court of Appeal was refused by Osler, J.A., on June 30th, 1902.]

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[IN THE COURT OF APPEAL.]

C. A.
1902
June 28.

TORONTO PUBLIC SCHOOL BOARD v. THE CORPORATION OF THE CITY OF TORONTO.

Public Schools—Trustees—Annual Estimates—Duty of Municipality—1 Edw. VII., ch. 39, secs. 65 (9), 71 (1) O.

A school board in preparing their estimates for the current year may include everything that in their judgment may be needed to meet legitimate expenditure, that is, expenditure upon objects or for purposes within their lawful authority ; and they are bound to prepare them in such a manner as to shew generally the several objects of such expenditure and what is required in respect of each.

The duty of the municipal council is to examine the estimates so far as to ascertain that they are for purposes *intra vires* of the school board. If an item or class of items is clearly for an unauthorized purpose, it is the duty of the council to reject it. But beyond this the council cannot go. If *intra vires* they cannot moderate or reduce it.

The council have no voice in the control of the affairs which are committed by law to the school board ; their duty is to levy and collect and pay out from time to time as required, the moneys shewn by the estimates to be necessary for lawful school purposes.

The council are not entitled to call for or to inspect the contracts which the board make with the teachers ; nor is it necessary in order to entitle the board to place the item of salaries in their estimate, that contracts should then have been entered into.

THIS was an appeal to the Court of Appeal from the judgment of the Divisional Court, reported 2 O.L.R. 727.

The appeal was argued on May 14th, 1902, before OSLER, MACLENNAN, MOSS, and GARROW, JJ.A., and BRITTON, J.

J. S. Fullerton, K.C., and *A. F. Lobb*, for the city of Toronto, appellants, contended that the school board were required under 1 Edw. VII., ch. 39, sec. 65 (9) O., to submit a proper estimate of expenses of the schools for the current year to the board of control, who had a right to cut down, to grant a certain portion and refuse to grant the rest: *Re Board of Education and The Corporation of the Town of Napanee* (1881), 29

Gr. 395; *Brockville School Trustees* v. *Town Council of Brockville* (1853), 9 U.C.R. 302; *In re School Trustees* v. *Corporation of Mount Forest* (1870), 29 U.C.R. 422; *In re School Trustees of South Fredericksburgh* (1876), 37 U.C.R. 534; *In re Board of Education and Corporation of Perth* (1877), 39 U.C.R. 34; *Board of Education of City of London* v. *The Corporation of the City of London* (1901), 1 O.L.R. 284; that what was in the discretion of the city should not be controlled by the Court: *Brooks* v. *Haldimand* (1879), 3 A.R. 73, at p. 76; that many specific items in the estimate given were objectionable, and as to others, particulars had properly been asked for; that the city auditors were made auditors for the school board, and were responsible to the city not to the board.

F. E. Hodgins, for the school board, contended that the city had no right to revise and control the estimates of the board; that the city council were elected by a smaller class of ratepayers than elected the public school board, and the constituencies were quite different, and that the city council had nothing to do with public school matters: *School Trustees of Toronto* v. *City of Toronto* (1860), 20 U.C.R. 302; *School Trustees of Toronto* v. *City of Toronto* (1863), 23 U.C.R. 203; *Re Board of Education of Napanee and The Corporation of the Town of Napanee*, 29 Gr. 395; *Grier* v. *St. Vincent* (1868), 13 Gr. 512, at pp. 518, 519; that it was the Education Department that the school board was responsible to: R.S.O. 1897, ch. 291, secs. 3, 4, 6, 8, 10; *People* v. *Wayne* (1866), 13 Mich. 233; that the word "estimate" had come down from the Act of 1847, 10-11 Vict. ch. 18, when school trustees were appointed by the city council; that the meaning of the word was reasonably explained in *People* v. *Clark* (1885), 44 N.Y. (S.C.) 201; that it must suffice to shew honesty of purpose and a legal object, but nothing more: *School Trustees of Port Hope* v. *Town Council of Port Hope* (1854), 4 C.P. 418; *School Trustees of Galt* v. *Municipality of Village of Galt* (1856), 13 U.C.R. 511; *Board of Education* v. *City of Detroit* (1890), 80 Mich. 548; *State* v. *Smith* (1873), 11 Wis. 65; that as to the items objected to they were reasonable, and the estimate was sufficient to demonstrate the honesty of the purposes for which they were asked, and this was all that was necessary.

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June 28. The judgment of the Court was delivered by OSLER, J.A.:—The facts of the case are so fully set forth, and the questions involved so fully, and to my mind so satisfactorily dealt with in the judgment of the Divisional Court, that I feel it to be unnecessary to enter upon them at length, and would content myself with simply recording my assent to the judgment, were it not that counsel for the defendants have so ably and earnestly argued for a construction of the statute which would enable them to place some check or limitation upon what is complained of as the extravagant expenditure of the school board.

The main question is whether the defendant corporation has the right to any, and if so, to what extent, to control, modify, cut down or diminish the estimates submitted by the plaintiffs of the expenses for the current year of the schools under their charge.

When the status of the parties is considered, and their respective duties and obligations properly appreciated, the question is solved and appears to be a very simple one.

Each of the parties is a municipal corporation—the defendants the corporation of the municipality, of which the council is the governing body; and the plaintiffs the public school board of the same municipality. The council and the school board are elected by different classes of ratepayers, though many of them are electors in both classes, and to their own constituents each is responsible. Each corporation is bound to the performance of certain statutory duties within the range of which, except in so far as they are reciprocal, neither is subject to be controlled by the other.

Sec. 56 and sec. 65 and its sub-sections of the Public Schools Act, 1 Edw. VII., ch. 39, contain the principal provisions relating to the powers and duties of the school board. It is sufficient for the purpose of illustration to mention these, but there are other sections also, their powers under which are not less clear. Section 65 enacts that "it shall be the duty of the trustees of all public schools, and they shall have power," to do the several things specified in the subsequent sub-sections. These powers and duties are in many respects described in general language, and some of them arise by implication, as is

pointed out in the judgment below. The exercise of some powers is discretionary, and where that is the case it is at the discretion of the trustees only, except where specially provided, as for example in secs. 76 and 78.

The due execution of these powers by the trustees involves, it is needless to say, the expenditure of money; and in the case of a municipality like Toronto, with a registered city school population of nearly 35,000, for whose accommodation it is the duty of the trustees to provide, and with forty-five school houses under their charge, that expenditure is necessarily very large. How is it to be provided for? With the exception of the Government grant, the means for it must be obtained in some way from the ratepayers of the municipality, and it is evident that it would not only be inconvenient, but it would in more than one respect cast an additional burden upon the ratepayers, if the trustees had to provide a separate staff of officials to strike and levy the necessary rate. Every motive of convenience and economy points to the council of the municipality as the most suitable body to provide, and through their own officials to collect with the ordinary municipal taxes of the year whatever is required for the purposes of school expenditure; and that, accordingly, has been for many years the policy of the Legislature indicated in the various School Acts passed from 1850 to the present time. This however, having regard to the constitution of the school corporation and their independent powers of action, by no means suggests that the council has, or should have, a controlling hand over their expenditure. They are in no sense the agents of the council as they may be said to have been under the School Act of 1847, 10-11 Vict. ch. 19 (C.). Rather is the contrary the case. It is well put in the respondents' reasons against the appeal, that school trustees are the representatives of the people as to school expenditure; just as aldermen — members of the council — are their representatives as to street improvements and municipal government, etc. The method prescribed by the Act by which the trustees are to procure the funds they require is an extremely simple one. They are "to submit to the municipal council on or before the first day of

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August, or at such time as may be required by the council, an estimate of the expenses of the schools under their charge for the current year:" sec. 65 (9). This being done, sec. 71 (1) enacts that "the council shall levy and collect upon the taxable property of the municipality in the manner provided by this Act and in the Municipal and Assessment Acts such sums as may be required by the trustees for school purposes, and shall pay the same to the treasurer of the public school board from time to time as may be required by the board for teachers' salaries and other expenses."

Now, as there is not a word in the Act which indicates that the council has any voice in the control or management of the affairs which are committed by law to the school board, it might be thought that these two sections made it tolerably clear that, the trustees on their side submitting to the council an estimate of what they required to meet their contemplated expense for lawful school purposes, the council's duty simply was to levy and collect and pay out, from time to time as required, the moneys shewn by the estimate to be necessary for such purposes.

The argument for the defendants seems to rest wholly upon the meaning they attribute to the words "submit" and "estimate" in sec. 65 (9), the latter, it is said, implying something proposed or deliberative and not final, and the former a submission of their proposed or tentative estimate to the better judgment and final decision of the council. With this contention I entirely disagree. Within the range of the subjects in respect of which the school board must, or may, exercise their powers and duties, they are the judges of what expenditure is necessary and proper; the estimate of that is their estimate, and, when they have sent it in to the council, their final estimate, just as the estimates of the council under section 404 of the Municipal Act, R.S.O. 1897, ch. 223, for the lawful purposes of the municipality, are their final estimates of the sum to be raised therefor by by-law under section 405. It can hardly be necessary to say that in both cases the word is used as descriptive of its subject-matter. An estimate is still an estimate even when it represents the final judgment of the body whose right and duty it is to prepare it, of what is required; and when that

body "submits" it to the council the estimate is merely laid before it or brought under its notice to be dealt with as required by section 71 (1).

To summarize: the right of the school board in preparing their estimate is to include therein everything that, in their best judgment, may be needed to meet legitimate expenditure —that is to say, expenditure upon objects or for purposes within their lawful authority; and their duty to the council is to prepare it in such a manner as to shew generally what these purposes are and what is required in respect of each. The right and duty of the council is to examine the estimate so far as to ascertain that it is for purposes *intra vires* the school board. If an item or class of items is clearly for a purpose for which the board is not authorized by law to expend money, it is the right and duty of the council to reject it. But beyond this, in my opinion, the council cannot go. I refer to *Canadian Pacific R.W. Co.* v. *City of Winnipeg* (1900), 30 S.C.R. 558, and to *Public School Trustees of Nottawasaga* v. *Corporation of Township of Nottawasaga* (1888), 15 A.R. 310. The following passage from the judgment of Burton, J.A., in that case is apposite: "The trustees are the parties entrusted by law with the management of the school section and the parties to determine on the amount required to be levied for the purpose; and when the Legislature enacted as a matter of convenience that the rates should be collected in the manner provided for the collection of the taxes, I should have supposed that no further change was intended than the substitution of one collector for another."

The provisions of the Municipal Act respecting the duties of the board of control in cities, particularly secs. 277 (*a*) (8), to which we have been referred since the argument, do not affect the question. There is nothing in any of them to suggest that the board of control are authorized to deal with the estimate of the school board in any other manner than I have already pointed out. Indeed, sub-section 8 rather aids that view, as it merely requires the various public bodies mentioned therein, including the school board, to "furnish" to the board of control their several and respective annual estimates.

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It is unnecessary to scrutinize in detail the various items of the estimate. They seem to me quite sufficient, supplemented as some of them have been from time to time, especially the item for repairs and alterations to school property, by further information while under the consideration of the council, to shew the subject of the proposed expenditure, and whether such subject is within the powers of the board. As regards the item over which the main battle has been fought, and which, indeed, seems to have provoked the council into litigation, viz., for school teachers' salaries, I have been unable to feel any doubt. I can see nothing illegal in the agreement under which the teachers were re-engaged at the end of the year 1900, looking to, or providing contingently for, an increase of the salaries of the same teachers by the new board of the following year. The council is not entitled to call for or to inspect the contracts which the board make with the teachers; nor is it necessary, in order to entitle the board to place the item of salaries in their estimate, that contracts should then have been actually entered into. If the sum required is what the board, in good faith, think necessary, having regard to the number of teachers and the arrangements they contemplate making with them, the council must be satisfied.

For these reasons, I think the appeal should be dismissed.

A. H. F. L.

[IN THE COURT OF APPEAL.]

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1902
Sept. 18.

REX v. TREVANNE.

Criminal Law—Procedure — Deposition of Witness — Inability of Witness to Attend Trial—Preliminary Enquiry before Magistrate — Opportunity to Cross-examine—Criminal Code, sec. 687.

At the preliminary enquiry before a magistrate on a charge of indecent assault on a female, the latter's depositions were taken, prisoner's counsel being present, but before conclusion of the cross-examination (in which the magistrate refused to allow some pertinent and necessary questions) proceedings were adjourned on account of witness' illness. Meanwhile the magistrate determined to send the case to trial, and telegraphed to prisoner's counsel so stating and asking whether he would come up or not. Counsel replied that if the case was to go to trial, it would be no use his coming, and accordingly did not further attend the proceedings. On lapse of the adjournment the magistrate went to the witness' residence and obtained her signature to her depositions as already taken, neither the prisoner nor his counsel being present, and afterwards resumed the enquiry, the prisoner being present but not the witness, and on the evidence already taken the prisoner was committed for trial. At the trial the witness was proved to be too ill to attend and her depositions taken as above were tendered by the Crown and admitted :—

Held, that in view of sec. 687 of the Criminal Code, as amended in 1900, the depositions were improperly received, prisoner's counsel not having had full opportunity to cross-examine.

THIS was a special case by the county Judge of the county of Lambton, stated in respect to certain criminal proceedings taken before him under a charge of indecent assault, and involving the question of the admissibility at the trial of the depositions of a witness taken on the preliminary inquiry before the magistrate, under the circumstances stated in the judgment.

The case was argued on September 16th, 1902, before OSLER, MACLENNAN, MOSS, and GARROW, JJ.A.

W. J. Tremeear, for the prisoner, relied upon sec. 687 of the Criminal Code, 55-56 Vict. ch. 29 (D.), and contended that there had been no proper opportunity to cross-examine; that a full opportunity of cross-examination is requisite, even though what was given was as full as the condition of the witness' health allowed: *Queen* v. *Mitchell* (1892), 56 J.P. 218; *Reg.* v. *Prestridge* (1881), 72 L.T. Jl. 94; he also referred to sec. 590 of the Criminal Code as to be read with sec. 687; and

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contended that even were the disputed evidence admissible, no offence had been made out under sec. 259 as to indecent assault.

F. Ford, for the Crown, contended that there had been full opportunity to cross-examine, but that the prisoner's counsel withdrew from the case; that he had waived his right to cross-examine; and that an offence under sec. 259 had been committed.

Tremeear, in reply.

September 18. The judgment of the Court was delivered by OSLER, J.A.:—Case stated by county Judge of Lambton county.

The prisoner was charged on February 25th, 1902, before a magistrate with having committed an indecent assault upon a female. The preliminary inquiry was begun at the house of the girl's father, where she was residing. The prisoner was represented by counsel, but before her cross-examination was concluded it became necessary, owing to her illness, to adjourn the proceedings, and they were adjourned accordingly until February 27th. In the meantime the magistrate consulted the County Crown Attorney with reference to the charge, and on hearing from him, telegraphed to the prisoner's counsel that he had got Mr. Bucke's opinion, and the case would have to go to Sarnia, and asked counsel to telegraph in reply whether he would come up or not. Counsel, taking this as an intimation that the accused would be committed for trial, telephoned the magistrate that if he intended to send the prisoner to Sarnia at any rate, there would be no use in his coming, and accordingly he did not appear at the subsequent proceedings. On the morning of the 27th the magistrate went out to where the girl was residing and obtained her signature to her deposition as it had then been taken down, the prisoner not being present or represented, and, in the afternoon, resumed the inquiry at his own office in Alvinston. The accused was present, but not the witness, whose examination had been interrupted at the first meeting. Prisoner was asked if he had anything to say. He replied, nothing; and on the evidence as already taken, was committed for trial.

At the trial it was proved that the girl was so ill as not to be able to travel, and her deposition, taken and signed as above mentioned, was tendered by the Crown and admitted in evidence, contrary to objection. The first question submitted to the Court by the county Judge is whether under these circumstances as they appear by the evidence taken at the trial and returned with the special case, the deposition was properly received in evidence.

The learned county Judge reports that he considered the prisoner's counsel had waived his right to further cross-examination, and that in any case the certificate on the depositions governed.

The 687th section of the Criminal Code, as amended by the Criminal Code Amendment Act, 1900, 63-64 Vict. ch. 46 (D.), enacts that: "If upon the trial of an accused person such facts are proved upon the oath or affirmation of any credible witness that it can be reasonably inferred therefrom that any person whose deposition has been theretofore taken in the investigation of the charge against such person, is dead or so ill as not to be able to travel . . . And if it is proved that such deposition was taken in the presence of the person accused, and that his counsel or solicitor had a full opportunity of cross-examining the witness, then, if the deposition purports to be signed by the Judge or justice before whom the same purports to have been taken, it shall be read as evidence in the prosecution without further proof thereof, unless it is proved that such certificate was not in fact signed by the Judge or justice purporting to have signed the same."

In order, therefore, to introduce as evidence in the prosecution the deposition of a witness taken at the preliminary inquiry, who is unable by reason of illness to attend and give evidence in person at the trial, three facts must be made to appear: (1) that the witness is so ill as not to be able to travel; (2) that the deposition was *taken* (as to which see sec. 687 of the Code) in presence of the accused; and (3) that his counsel or solicitor had a full opportunity of cross-examining the witness. These conditions being proved by evidence *aliunde* the deposition, *then*, if the deposition *purports to be*

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signed by the justice, it shall be read in evidence in the prosecution.

It is not necessary in this case to discuss the question whether the deposition of a witness, on an enquiry where the accused has not been represented by counsel at all, can be admitted as evidence under this section as now amended. What is relied upon by the Crown is that at one stage of the enquiry counsel did appear and entered upon the cross-examination, and then waived his right to cross-examine further.

Through no fault, however, of his or of the accused, but solely in consequence of the illness of the witness, the cross-examination was interrupted, and the enquiry was necessarily adjourned, and counsel — for what reason, I think, it does not matter in point of law—did not attend again. It does appear that it was because he thought it would be unnecessary or useless to do so as the magistrate had determined to commit the accused to trial. The cross-examination never was in fact completed. It had been interrupted at the most critical and important stage of it, and the witness and accused were never brought face to face together again. The magistrate, most irregularly, obtained the signature of the witness to her incomplete deposition in the absence of the prisoner, and afterwards, on this incomplete deposition, the witness not being present, committed him for trial. Plainly, therefore, it is impossible to say that the prisoner's counsel, not to say the prisoner himself, ever had a full opportunity of cross-examining the witness. I see no pretence for saying that he waived it.

Even, however, if the inquiry had closed on the first day, I should have thought that the deposition disclosed on its face that there had not been a full opportunity of cross-examining the witness, as the magistrate interfered with the counsel and prevented questions being answered which, however painful to all parties concerned, were entirely pertinent and necessary to elucidate the vital point of the defence.

The first question submitted by the special case must, therefore, be answered in the negative, viz., that the deposition was not properly received in evidence, and as there is no other

evidence on which the conviction can be supported, it must be set aside and the prisoner discharged.

It is not necessary to answer the other question whether the evidence would, if admissible, have supported a charge under sec. 259, sub-secs. (*a*) and (*b*) of the Code.

A. H. F. L.

[IN CHAMBERS.]

IN RE EQUITABLE SAVINGS, LOAN AND BUILDING ASSOCIATION.

1902
Sept. 5.

Company — Ontario Winding-Up Act — Practice on Appeal — Settling Appeal Case—Final Order—R.S.O. 1897, ch. 222.

Section 27 of the Ontario Joint Stock Companies Winding-Up Act, R.S.O. 1897, ch. 222, contains the whole code of proceedings on an appeal under that Act. There is no provision requiring reasons for or against the appeal, or any delivery or settlement of the case in appeal.

Semble, an order of a county Judge rescinding an order previously made by him under sec. 41 of the above Act for the dissolution of the company is a final order, and therefore appealable.

THIS was a motion made before OSLER, J.A., on September 3rd, 1902, in Chambers, to quash an appeal to the Court of Appeal under the circumstances mentioned in the judgment.

C. D. Scott, for the respondent.

A. B. Aylesworth, K.C., for the appellant.

September 5. OSLER, J.A.:—Appeal from an order of the county Judge of York rescinding an order previously made by him under sec. 41 of the Act for the dissolution of this company.

The respondent moves to quash an appeal on the ground that the appeal case has not been settled in accordance with the practice prescribed in the case of appeals from the High Court. The papers have been transmitted to the office of the Court of Appeal and have been printed by the appellant and copies thereof with reasons of appeal have been delivered to the respondent.

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I think sec. 27 of the Act at present contains the code of proceedings on an appeal of this nature. I find no provision made for it in the Consolidated Rules, and I am not aware that any rules of practice or procedure have been made by the Judges to meet the case. The appellant must proceed with his appeal according to law, and that is, as I think, according to what is required by sec. 27. I do not see that reasons pro and con the appeal are required or any delivery or settlement of the prepared case. The practice hitherto has been to send up the original papers and hear the appeal upon them. See *In re The D. A. Jones Company* (1892), 19 A.R. 63; *In re The Haggert Brothers Manufacturing Co. (Limited)* (1893), 20 A.R. 597; *Re Sarnia Oil Company* (1893), 15 P.R. 183.

It is also contended that the order in question is not a final order. The inclination of my opinion is that it is, and therefore an appealable one. But as the appeal is in fact set down for hearing by the Court of Appeal and not by a single Judge I cannot dispose of the point, and whatever there may be in it I must leave for the Court, upon whom no order of mine can confer jurisdiction.

The motion is therefore dismissed. Costs to the appellant in any event.

I may add that the parties desired that I would refer the appeal to the full Court, assuming that it was taken to a single Judge. The form of the appeal is not limited, and therefore I think it is to the Court not to a Judge, but if it is thought desirable I will formally refer it.

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[IN THE COURT OF APPEAL.]

NELSON COKE AND GAS CO. ET AL. V. PELLATT.

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Company—Subscription for Shares—Contract by Deed—Delivery—"Issue" and "Allotment" of Shares—Calls—Resolutions and Letters—"Offer"—Preference Shares.

Held, reversing the judgment of LOUNT, J., 2 O.L.R. 390, that the defendant's undertaking to take shares in the plaintiff company, when issued and allotted, being by deed, for valuable consideration, and being delivered to an agent of the company, was not revocable as a mere offer would be, and that the resolutions of the company and the letters to the defendant were a sufficient "issue" and "allotment" of the shares.

Xenos v. *Wickham* (1866), L.R. 2 H.L. 296, followed.

Nasmith v. *Manning* (1880-1), 5 A.R. 126, 5 S.C.R. 417, distinguished.

Held, also, that provision therefor having been made in the memorandum and articles of association, the preference shares of the company were lawfully created.

AN appeal by the plaintiffs, who were the above named company and the directors thereof, from the judgment of Lount, J., 2 O.L.R. 390, dismissing an action to recover from the defendant $10,000 for shares in the company alleged to have been subscribed for by him and allotted and issued to him.

The facts appear in the judgment of Lount, J., as reported, and in the judgment of Maclennan, J.A., *infra*.

The appeal was heard by ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 17th and 18th December, 1901.

George H. Watson, K.C., for the appellants. The agreements signed and sealed by the defendant were, when delivered, completed contracts; nothing had to be done by the company to establish his liability thereunder; and he could not rescind by his own act: *Gunn's* case (1867), L.R. 3 Ch. 40; *Pellatt's* case (1867), L. R. 2 Ch. 527, 535; *Bloxam's* case (1864), 33 Beav. 529; *Hamley's* case (1877), 5 Ch. D. 705; *Hebb's* case (1867), L.R. 4 Eq. 9; Emery's Company Law, pp. 95-6. But, if the agreements were no more than offers to take shares, they were duly accepted by the company, and notice thereof was given to the defendant. He admits the receipt of notices of calls and demands, and also of oral demands before the 15th November, when he attempted to repudiate, and he could not thereafter discharge himself by his own act. By the acts of

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the company, the shares were sufficiently allotted, especially having regard to their charter and the provisions of the statute under which it issued and to their by-laws and resolutions passed before the 15th November. No formal by-law or resolution allotting the shares was necessary. It is true that in case of a mere offer there must be a favourable response, but it need not be by formal by-law or resolution. But, even assuming that a formal allotment was necessary for any purpose, it was not necessary to complete the contract, but only in order to mature the time for payment and place the defendant in default, and this formal allotment was made in December. What was done then, if necessary, related back and validated what was done before: *Bolton* v. *Lambert* (1889), 41 Ch. D. 95; *Ex p. Bosanquet* (1890), 45 Ch. D. 16. The defendant is estopped from setting up delay on the part of the company. The appellants should be allowed now to put in evidence their original register or stock book, which was not produced at the trial: *Butler* v. *McMicken* (1900), 32 O.R. 422; *Dolen* v. *Metropolitan Life Ins. Co.* (1894), 26 O.R. 67; *Wood* v. *Reesor* (1895), 22 A.R. 57; *In re Haggert Brothers Mfg. Co.* (1892), 19 A.R. 582, 589. The book shews that the defendant was a member of the company in February, 1900. Being registered as a member of the company, he is in the position of a shareholder: *In re Queen City Refining Co.* (1885), 10 O.R. 264; *Re Zoological and Acclimatization Society* (1899), 17 O.R. 331; *Re London Speaker Printing Co.* (1889), 16 A.R. 508; *In re Haggert Brothers Mfg. Co.*, 19 A.R. 582; *Denison* v. *Lesslie* (1878), 43 U.C.R. 22, (1879), 3 A.R. 536.

H. J. Scott, K.C., and *H. H. Macrae*, for the defendant, the respondent. The appellants' rights depend upon the two documents signed by the defendant. The first was superseded by the second, as found by the trial Judge, and therefore the claim must be on the second. Before the execution of the second document no authority had been given by the company to Doolittle, who is one of the plaintiffs, to enter into any agreement or to apply for subscriptions. This document was never executed by the company nor accepted by them, and was merely an offer to take stock: *Pellatt's* case, L.R. 2 Ch. 527; *Ramsgate Victoria Hotel Co.* v. *Montefiore* (1866), L.R. 1 Ex.

109; *In re Scottish Petroleum Co.* (1882), 23 Ch. D. 413; *Ward's* case (1870), L.R. 10 Eq. 659; *Nasmith* v. *Manning* (1880), 5 A.R. 126, (1881), 5 S.C.R. 417. Such an offer must be completed by the allotment of shares and notice to the subscriber, and until this is done the latter may withdraw at any time: Buckley's Companies Acts, 7th ed., p. 64; Lindley on Companies, 5th ed., p. 13; Brice on Ultra Vires, 3rd ed., p. 284; Palmer's Company Law, p. 69; *Ritso's* case (1877), 4 Ch. D. 774; *Hebb's* case, L.R. 4 Eq. 9; *Pentelow's* case (1869), L.R. 4 Ch. 178. No notice of allotment was given to the defendant until after the withdrawal of his offer. A demand for a call is not notice of allotment: *Pellatt's* case, L.R. 2 Ch. at p. 533. The acts relied upon by the appellants are not sufficient to dispense with a formal allotment and notice. By sec. 3 of the articles of association the directors had power to issue a certain proportion of preference stock, but no preference stock was ever issued, and no notice of call or other proceedings in reference to that stock could have any effect. The defendant never took any part in the proceedings of the company, nor did he ever do anything to estop himself from saying he was not a shareholder. No ground is shewn for the admission of fresh evidence, and if it were admitted there would have to be a new trial, for which no foundation has been laid. As to there being a seal on the document, that is of no importance under *Nasmith* v. *Manning*, 5 A.R. 126, 5 S.C.R. 417. There are two classes of cases in the books: (1) where the company makes an offer which is accepted, and that is equivalent to allotment, as in *Adams's* case (1872), L.R. 13 Eq. 474; and (2) cases depending on the doctrine of estoppel, such as the case of a director being found liable as a contributory in a winding-up. *Bolton* v. *Lambert*, 41 Ch. D. 95, does not apply, and has been doubted in *Fleming* v. *Bank of New Zealand*, [1900] A.C. 577, 587. All the cases shew that the defendant may withdraw at any time before notice of allotment.

Watson, in reply. What distinguishes this case is that there was acceptance by the company of the defendant as a shareholder. As to the preferred shares, they are authorized by the articles of association and charter of the company.

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September 19. MACLENNAN, J.A.:—I am of opinion that this appeal ought to be allowed.

The facts are very fully stated in the judgment.

It was argued by Mr. Scott that the plaintiffs could not succeed as to the 200 preference shares, inasmuch as no such shares had been lawfully created, there not having been any special resolution of the company for that purpose, as provided by sec. 55 of the Companies Act, R.S.B.C. ch. 44.

The answer to that contention is, that provision was made for preference shares in the memorandum and articles of association. Section 5 of the memorandum is as follows: "The capital of the company is $250,000, divided into 10,000 shares of $25 each, with power to divide the shares in the capital for the time being into several classes, and to attach thereto respectively any preferential, deferred, qualified, or special rights, privileges, or conditions;" and sec. 3 of the articles is this: "The directors may, if they think fit, issue not more than 300 shares of the capital stock of the company as preference shares, bearing a preferential dividend at 7 per cent. per annum from the time when such shares have been subscribed for and fully paid up, payable half-yearly on the 15th days of January and July in each year, but to no further dividend, and the holders of such shares shall be entitled to receive such preferential dividend in priority to any dividend being paid on ordinary shares or stock, and also the right in a winding-up to repayment of capital and any arrears of dividend in priority to the ordinary shares."

That these provisions are legal and valid features of the constitution of the company is clear: *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), L.R. 7 H. L. 653; *In re South Durham Brewery Co.* (1885), 31 Ch. D. 261.

There is, therefore, no distinction such as suggested by Mr. Scott between the two classes of shares in question, and if the defendant is liable upon the one class, he is equally liable on the other.

The ground on which the learned Judge proceeded was that the first instrument executed by the defendant was superseded by the second, that the second was an application for shares,

and there had been no allotment before he had withdrawn his application.

The company was incorporated under the Companies Act of British Columbia, R.S.B.C. ch. 44, on the 26th August, 1899, and the first document signed and sealed by the defendant is dated on the 1st September following, but was executed within two or three days afterwards. It is in the form of an agreement or covenant by the subscribers with five named persons, described as the applicants for the company's charter, and with the company when incorporated, to become shareholders in the company for the amounts of the capital stock and of the class set opposite their respective names, when the same should be issued and allotted to them, and to accept the stock when allotted to them, and to pay for the same when a call or calls should be made upon them by the directors. That document was executed by the defendant and two other persons. At that time an agreement or understanding had been come to between the defendant and Dr. Doolittle, one of the charter members and a director of the company, that the defendant should undertake to procure the subscription of the greater part of the shares for the company, for a commission. In the course of his canvass for subscriptions, it was suggested to the defendant that it would be better to have the subscriptions in a book, than upon the loose sheets which he himself and the other two persons had signed. A book was accordingly procured, with a subscription heading therein, of which the following is a copy:—

The Nelson Coke and Gas Company, Limited.
Capital $250,000. Shares $25 each.
Preference Stock, 7 per cent. cumulative, $ 75,000
Common Stock..... 175,000

We, the undersigned, do hereby severally subscribe for and agree to take the respective amounts of the capital stock of the Nelson Coke and Gas Company, Limited, and of the class thereof, set opposite to our respective names, as hereunder and hereinafter written, and to become shareholders in said company to the said amounts, when and as the said stock so subscribed for by us severally shall be issued and allotted to us; and we do hereby severally covenant, each with the other

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and others, with the said company, and the directors thereof, to accept the said stock when the same shall be allotted to us severally, and to pay for the same to the said company, at par, when and as a call or calls for payment shall be made upon us, severally, by the directors.

In witness whereof we have set our hands and seals this 1st day of September, 1899.

Both the defendant and the other two gentlemen who had executed the first instrument, executed the new one, a few days after the first. The other two gentlemen struck their names out of the first instrument, but the defendant did not do so. If anything turned upon it, I should not be able to agree with the learned Judge that the defendant's execution of the second document superseded the first. The most he would say in evidence was, that in executing the second document, he did not intend it as a subscription for 400 shares in addition to the former. I do not think, however, that anything at all turns upon the question whether the old agreement was put an end to by the new. The legal effect of both is the same. In both the defendant covenants with the company to become a shareholder, to take 200 shares of each class, when issued and allotted, and to pay for them at par when calls should be made.

The evidence shews that when the defendant executed the agreement he was in constant communication with Dr. Doolittle, a director of the company, and that they were associated together in obtaining subscriptions for shares on behalf of the company.

The contract in question is, therefore, one entered into by the defendant with the company, at the request of one of its directors, acting for and on behalf of the company.

In *Hebb's* case, L.R. 4 Eq. 9, 11, Lord Romilly said: "These applications for and allotments of shares must be treated upon the same principles as ordinary contracts between individuals." In *Gunn's* case, L. R. 3 Ch. 40, Rolt, L.J., said (p. 43) that a contract between a company and a person who makes an application to become a member is the same in principle as an ordinary contract; that there must be the consent of two parties to a contract; one man may make an offer to another, and say, "I agree to buy your estate;" but the person to whom

he has made the offer must say, "I agree to sell you the estate," or he must do something equivalent to an acceptance, something which satisfies the Court, either by words or conduct, that the offer has been accepted to the knowledge of the person who made the offer; and he adds: "I think that is requisite in the case of an application for shares, just as in the case of any other contract." Again, referring to the observation of Lord Cairns in *Pellatt's* case, "I think that where an individual applies for shares in a company, there being no obligation to let him have any, there must be a response by the company, otherwise there is no contract," Rolt, L.J., says: "I did not take Lord Cairns, in *Pellatt's* case, to have meant that there must be a response in writing, but that what he meant was this—there must be in writing, or verbally, or by conduct something to shew the applicant that there was a response by the company to his offer."

Treating this instrument, then, like an ordinary contract, what is its proper legal effect? The company was duly incorporated, and had $250,000 of capital to dispose of, divided into shares of $25 each, 3000 shares being preference shares, and 7000 common. One of the directors applies to the defendant to assist him in disposing of the shares. They find a number of purchasers who agree to purchase shares, and who execute the deed of subscription prepared for the purpose. The defendant witnessed the first three signatures, and afterwards executed the deed himself, agreeing to take the shares now in question. It is said this is an application or a request for shares. It may be so regarded; but it is something more than an application or request. It has all the elements of a completed contract, and that by deed, and for valuable consideration. The shares are the property of the company, and the defendant agrees with the company to purchase them, and to pay for them at par, when issued and allotted. There is no time limited within which the purchase is to be completed. It is not pretended that this deed was delivered in escrow or was not intended to take effect immediately. It was delivered to the company through its agent. It is said that this deed was revocable, and that the defendant could have revoked it and withdrawn from it the next day or the next moment. I do

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not understand such to be the law. No doubt a mere offer or proposal, either by parol or by mere writing, to take shares, is revocable before acceptance, like any other similar offer or proposal to buy or sell any other commodity: *Ritso's* case, 4 Ch. D. 774. But it is otherwise when it is a contract by deed. In his treatise on Contracts, 6th ed., pp. 47, 48, Pollock says: "The ordinary rules of proposal and acceptance do not apply to promises made by deed. It is established by a series of authorities which appear to be confirmed by the *ratio decidendi* of *Xenos* v. *Wickham* (1866), L.R. 2 H. L. 296, in the House of Lords, that a promise so made is at once operative without regard to the other party's acceptance. It creates an obligation which whenever it comes to his knowledge affords a cause of action without any other signification of his assent, and in the meanwhile it is irrevocable." Anson, 9th ed., p. 34, says: "An exception to this general rule as to the revocability of an offer must be made in the case of offers under seal. Such an offer cannot be revoked: even though it is not communicated to the offeree it remains open for his acceptance when he becomes aware of its existence. There is no doubt that a grant under seal is binding on the grantor and those who claim under him, though it has never been communicated to the grantee, if it has been duly delivered; and it would seem that an obligation created by deed is on the same footing. The promisor is bound, but the promisee need not take advantage of the promise unless he choose; he may repudiate it, and it then lapses."

I think these statements of the law are warranted by the case of *Xenos* v. *Wickham*, L. R. 2 H. L. 296, referred to by these learned authors, and by the citations in that case at p. 300, and *Doe Garnons* v. *Knight* (1826), 5 B. & C. 671, 692. See also *Moss* v. *Barton* (1866), L.R. 1 Eq. 474; *Buckland* v. *Papillon* (1866), L.R. 2 Ch. 67.

The present case is even stronger than *Xenos* v. *Wickham*, for this deed was prepared on behalf of the company, and remained in its possession after execution.

Now, if this deed was binding upon the defendant, and irrevocable by him, as I think it was, it has never been

repudiated by the company, but, on the contrary, the company has always treated it as valid and binding on both parties.

It is, however, insisted that it was essential that the shares which the defendant agreed to purchase should have been issued and allotted to him, and that this was not done; that at all events they should have been allotted within a reasonable time, and, that not having been done, the appellant was at liberty to withdraw his offer, which he did before allotment. Numerous cases were cited laying it down that when an offer to take shares is made, it must be accepted by the company in a reasonable time, an allotment must be made, and notice communicated to the party, and that he may withdraw his offer at any time before allotment. That is undoubtedly so in the case of a mere offer not under seal. What we have here, however, is a contract, and the substance of it is to purchase from the company the shares in question, and to pay for them at par when a call or calls are made. The purchase is of a definite number of shares, and not of so many as the company might allot, and, I take it, the defendant would not be bound to take any less number than 200 of each class. The covenant is to take them when issued and allotted. As applied to a fixed quantity of anything, or a fixed number of shares, the word "allotment" can mean nothing more than to give, to assign, to set apart, to appropriate. The word has all these meanings. Nor does the word "issue" in the present case mean the doing of any particular act, and I think "issue" and "allotment" taken together mean no more than some signification by the company of its assent that the defendant now was or had become the owner of the number of shares which he agreed to take. All that was required was, in the language of Lord Cairns in *Pellatt's* case, "a response," that is, a favourable response, "by the company;" or, as interpreted by Rolt, L.J., "in writing, or verbally, or by conduct, something to shew the applicant that there was a response by the company to his offer." See *Bird's* case (1863), 4 DeG. J. & S. 200; *In re Richards and Home Assurance Assn.* (1871), L.R. 6 C. P. 591, 595, *per* Montague Smith, J.: "Anything emanating from the company which indicates to the party that the shares have been allotted to him, and which binds them, will be sufficient."

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Now what took place here was this. The defendant's subscription was made some time in September, and on the 14th December the board passed a resolution that the subscribed for preferred stock of the company be called up in full, and that the treasurer notify all subscribers to pay the amount of their subscriptions on or before the 18th January, 1900. On the 16th December the treasurer wrote to the defendant as follows: "I beg to notify you that the directors have made a call upon the preference shareholders for the whole amount of the stock subscribed by them, this amount to be paid on the 18th day of January, 1900, to the treasurer, W. H. Pearson jr., at No. 269 Front street east, Toronto. The amount of preference stock subscribed for by you is 100 shares, and the amount therefore payable by you on the above mentioned date is $2,500." The defendant had subscribed for 100 shares of each class in his own name, and for 100 other shares of each class, adding the words "in trust." So a second letter was written to him on the same day, in the same words, addressed to him with the addition of the words "in trust."

Now the resolution of the company, and the letters of the treasurer, having regard to the defendant's contract, can have but one meaning, namely, that the company had appropriated to him 200 preference shares, and called for payment in full. I think it impossible to say that the resolution was not a most unequivocal act issuing and allotting to him those shares.

On the 13th March following, the board passed a similar resolution with respect to the shares of common stock which had been subscribed for, and calling for payment in full on or before the 12th April, and thereupon on the 21st March letters in the same terms as the former were written to the defendant by the treasurer.

I am of opinion that these resolutions and letters were a sufficient issue and allotment of the shares which the defendant had agreed to take, and that he thereupon became bound to accept and pay for them.

It was not until long afterwards that the defendant repudiated his subscription and his liability as a shareholder, namely, some time in November following. He was repeatedly pressed for payment in May, both by letter and verbally,

pleading that his money was tied up and asking for time. When in November he assumed to withdraw his offer, the company went through the form of making an allotment of the shares to the defendant, and notified him thereof, and the present action was commenced on the 9th January, 1901.

While I think the resolutions of 14th December and 13th March were a sufficient issue and allotment within the contract, yet if that were otherwise, the formal allotment in November was in time. I do not see how the defendant could get rid of the obligation of his deed by any mere notice of repudiation and withdrawal. He might demand the shares, offering to pay, and in the event of refusal by the company, he would be discharged, or he might be entitled to relief by action for rescission, after notice calling upon the company within a reasonable time to give him the shares.

Great reliance was placed by Mr. Scott upon the case of *Nasmith* v. *Manning*, in this Court, ultimately decided in the Supreme Court, 5 A.R. 126 and 5 S.C.R. 417. That was an action of *scire facias* by a creditor of a railway company against the defendant as a shareholder of the company, to recover the amount alleged to be due and owing by him upon his shares. There, as here, the defendant had agreed with the company by deed to become the holder of a specific number of shares, and upon allotment to pay calls when made. See the deed, 29 C.P. 36, and 5 S.C.R. at p. 456. The shares were allotted, and the question turned upon whether any notice had ever been given to or received by the defendant. The subscription was in 1869, and the action was in 1878. The defendant had never acted as a shareholder, had never paid any calls, and it was held by this Court, Moss, C.J., dissenting, that there was no evidence that the defendant had ever received any intimation that he had been accepted as a shareholder, or that shares had been allotted to him, and that the action must fail. It was not a question whether the defendant was bound by his deed and could be compelled to perform it, but whether it had been performed, so that the defendant had become a legal shareholder, for *sci. fa.* by a creditor only lies against actual legal shareholders. The judgment was affirmed in the Supreme Court, Ritchie, C.J.,

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and Gwynne, J., dissenting, the Chief Justice holding that on allotment by the company the defendant became a shareholder in fact and in law, and Gwynne, J., that he became such by signing the deed at the request of the company, and also that the findings of fact of the trial Judge ought not to have been disturbed. The other learned Judges, being the majority, proceeded on the ground, which seems to have been altogether a mistake, that when the deed whereby the defendant agreed to take the shares was executed, the company had not yet been incorporated, and did not exist.

That case, therefore, is not one which governs the present, and I am of opinion that the judgment is wrong and ought to be reversed.

OSLER and MOSS, JJ.A., concurred.

ARMOUR, C.J.O., took no part.

LISTER, J.A., died while the case was *sub judice*.

T. T. R.

[IN CHAMBERS.]

CENTAUR CYCLE CO. V. HILL ET AL. (NO. 2.)

1902
Oct. 2.

Court of Appeal—Joint Appeal of Two Parties—Security Furnished by One—Payment into Court—Abandonment of Appeal—Motion for Payment out—Costs—Set-off—Increased Security—Limitation of Amount—Rule 830.

Two defendants appealed to the Court of Appeal from a judgment of the High Court; the notice of appeal was a joint one; and $200 was paid into Court, as security for the respondents' (plaintiffs') costs of appeal, by one of the appellants, but in the name of both and for the joint benefit:—

Held, that the appellant who had paid the money in was not entitled, upon abandoning his appeal, to have the money paid out to him, the other appellant desiring and intending to avail himself of the deposit and to proceed with the appeal.

The first appellant's motion for payment out being dismissed with costs to the other appellant, and it appearing that by the judgment appealed against the first appellant was entitled to be indemnified by the other against all amounts payable by the first under the judgment, and to recover from the other any amount so paid and his costs of the action, etc.:—

Held, that the costs of the motion should be set off against anything the first appellant might already have paid, or might ultimately have to pay, under the provisions of the judgment referred to, as the result of the appeal.

Held, under the circumstances of the case, that the appeal would be more expensive than usual, and that the security should be increased to $400; but that, upon the true construction of Rule 830, sub-secs. 1, 4, 8, where security is given by payment into Court, it cannot be increased to more than $400.

MOTION by the defendant Love for payment out of Court to him of $200 paid in as security for the costs of the appeal of both defendants to the Court of Appeal; and motion by the plaintiffs for an order for increased security, on the ground that the appeal would be more than usually expensive. The facts are stated in the judgment. The decision upon a previous motion in the same case is reported *ante* p. 92.

Both motions were heard by MACLENNAN, J.A., in Chambers, on the 1st October, 1902.

W. E. Raney, for the defendant Love.

W. H. Blake, K.C., for the defendant Hill, opposed the first motion.

W. E. Middleton, for the plaintiffs.

C. W. Kerr, for the defendant Hill, opposed the second motion.

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October 2. MACLENNAN, J.A.:—It appeared that the defendant Love has abandoned his appeal, having effected a settlement with the plaintiffs (respondents) of the matters in dispute. The respondents have no objection to the motion, if, as between the appellants themselves, Love is entitled to have the money paid out to him. Mr. Blake waives his objection that the motion ought to be made to a Judge of the High Court, and the parties will accept my decision *quantum valeat.*

On the argument I decided that the defendant Love was not entitled to succeed on his motion, the defendant Hill desiring and intending to avail himself of the deposit and to proceed with the appeal. It appeared that, while the deposit was made by Love with his own money, the notice of appeal was a joint one, and the deposit was made in the name of both and for the joint benefit. It was, in effect, a loan or advance made by Love to or for the benefit of his co-defendant, and which could not be recalled, by undoing the purpose which it was intended to serve and to which it was applied. I dismissed the motion with costs, but reserved the question of set-off.

On looking at the judgment appealed from, I find that by paragraphs 17 and 18 Love is entitled to be indemnified by Hill against all amounts payable by him, Love, under the judgment, and to recover from Hill any amount so paid, and his costs of the action and the appeal from the Master's report. I therefore direct that the cost of Love's motion be set off against anything he may already have paid, or may ultimately have to pay, under those paragraphs of the judgment, as the result of the appeal.

Having regard to the nature of the case and the proceedings before the Master and on the appeals from his report, I have come to the conclusion that the appeal will be more expensive than usual, and that the security should be increased.

I accede to Mr. Kerr's argument upon the construction of Rule 830, sub-secs. 1, 4, and 8. Sub-section 1 says: "The security shall be by bond which may be according to Form No. 197." Sub-section 4: "Where security is to be given for costs of the appeal the same shall be given for $400." Then comes sub-sec. 8: "Instead of giving a bond the appellant may without order pay into Court a sum of money equal to half the

penalty of the bond . . . and the money when so paid in shall stand as security in lieu of a bond, but either party may apply to the Court or a Judge to increase or diminish the amount of such *payment into Court.*" This sub-section, 8, is evidently intended to operate in ease of the appellant. If he gives a bond for $400, the respondent must rest content with that; he cannot have it increased beyond $400, no matter how expensive the appeal may be expected to be. But the appellant has the alternative of paying in $200 in money, instead of giving a bond for $400; and it would be a strange result if, having availed himself of the option given by the Rule, and having chosen to pay money in instead of giving a bond, he thereby became liable to pay in a further sum of money, it might be far exceeding the penalty of the bond. I think, upon the construction of the Rule, the sum paid in cannot be increased to more than $400.

I think that in this case the security should be increased to $400. There is already a sum of $200 paid in, and the order will be to pay in a further sum of $200. Costs of motion in the appeal.

T. T. R.

[DIVISIONAL COURT.]

D. C.
1902
Aug. 6.

CROSBY v. BALL.

Friendly Society—Benefit Certificate—"Dependent"—Supposititious Wife.

A supposititious wife of the holder of a life benefit certificate in a friendly society, who had married him in ignorance that he had a lawful wife living, and had cohabited with him some six years and up to his death, believing herself during the greater part of this time to be his wife, and to whom the certificate was made payable by name, with the appellation "my wife" added, was held, after his decease, entitled as against the lawful wife to the moneys payable thereunder as being a "dependent" within the meaning of the society's rules, notwithstanding the conjunction of that word with a number of others importing relationship by blood or affinity:—

Held, also, that although the society had not stood upon their strict rights but had paid the money into Court to be dealt with by the Court, that fact did not affect the rights of the parties, which must be determined according to law, and not *ex æquo et bono*.

APPEAL by the plaintiff, Harriet T. Crosby, to the Divisional Court from the judgment of the Chancellor of Ontario, delivered after the trial of an interpleader issue before him, without a jury, at Sarnia, on November 30th, 1901.

An endowment certificate for $1000 was issued by the Supreme Tent of the Knights of the Maccabees of the World on February 10th, 1892, to Philip Crosby, payable upon his death to "Mary Crosby, his wife."

Philip Crosby died in the summer of 1900, and the amount of the endowment certificate was claimed from them by Harriet Teresa Crosby, otherwise called Hattie Connors, and also by Mary Ball, the defendant.

An order was made upon the application of the Supreme Tent of the Knights of the Maccabees on October 13th, 1900, allowing them to pay into Court the amount of the endowment certificate, being $1000, less their costs, and directing the two claimants to proceed to the trial of an issue in which Harriet Teresa Crosby should be plaintiff and Mary Ball defendant, to determine whether the sum of $939.07 (being the amount of the said endowment, less the costs of the application to pay it in, etc.), was the property of the said Crosby as against the said Ball. An issue was thereupon settled, and the parties proceeded to trial.

It appeared from the evidence that the deceased Philip Crosby had been married to the plaintiff, Harriet Teresa Crosby, in the county of Bruce, Ontario, on May 1st, 1860; that they had lived together as man and wife for sixteen or eighteen years, and had three children born to them. Then she left him because, she says, he would not support her, and she sailed as cook on vessels on the lakes for some years, and then settled down in Buffalo, N.Y., where she now lives. On February 17th, 1886, Philip Crosby went through another ceremony of marriage with Mary Ball, the defendant in the issue, at Marine City, Michigan, and they lived together at Sombra, Ontario, as man and wife until his death. It was while he was cohabiting with her that he joined the Knights of the Maccabees and took out the certificate in question.

On March 8th, 1900, he made an indorsement on the certificate as follows: "I, Philip Crosby, to whom the within certificate was issued, do hereby revoke my former direction as to payment of the endowment benefit due at my death, and now authorize and direct such payment to be made to Mary Ball, otherwise known as Mary Crosby, bearing relationship to myself of dependent;" but this proposed transfer was not approved by the supreme record keeper as required by the rules of the society. The learned Chancellor held that upon the evidence he should find that the defendant did not know when she went through the form of marriage with Philip Crosby that his wife was living; he further held that the question was not to be determined between the two claimants as one of strict legal right but *ex æquo et bono*, because the Knights of the Maccabees had not stood upon their strict rights but had paid the money into Court to be dealt with by the Court; he decided the issue in favour of the defendant Mary Ball, and directed that the plaintiff should pay the costs.

The plaintiff appealed from this judgment to the Divisional Court, and the appeal was argued on June 5th, 1902, before FALCONBRIDGE, C.J.K.B., and STREET and BRITTON, JJ.

W. M. Douglas, K.C., for the plaintiff, contended that the legal status of the parties was not in any way altered because the money was in Court: *Johnston* v. *Catholic Mutual Bene-*

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volent Association (1897), 24 A.R. 88, especially at p. 98; *Simmons* v. *Simmons* (1893), 24 O.R. 662; that "dependent" meant some one *in loco filii.*

A. Weir, for the defendant, contended that the insurance was effected for the defendant, and that the evidence shewed no one else was intended; that she was entitled as a "dependent," even if not the plaintiff's wife: *In re Petts* (1859), 27 Beav. 576; *Pratt* v. *Mathew* (1856), 22 Beav. 328; *Penfold* v. *Giles* (1836), 6 L.J. Eq. N.S. 4; *Dilley* v. *Matthews* (1863), 11 W.R. 614; *Story* v. *Williamsburg Masonic Mutual Benefit Association* (1884), 95 N.Y. 474; *Durian* v. *The Central Verein of the Hermann's Sœhnne* (1877), 7 Daly (N.Y.) 168; *Overbeck* v. *Overbeck* (1893), 155 Penn. 5; that the defendant was a "dependent" within the authorities: *Main Colliery Co.* v. *Davies*, [1900] A.C. 358; *Styles* v. *Supreme Council of Royal Arcanum* (1897), 29 O.R. 38; *McCarthy* v. *Supreme Lodge New England Order of Protection* (1891), 153 Mass. 314; *Ballou* v. *Gile* (1880), 50 Wis. 614; Bacon on Benefit Societies, 1st ed., sec. 261, p. 394.

August 6. FALCONBRIDGE, C.J.:—The fact that the Knights of the Maccabees have paid the money into Court can make no difference as to the rights of the parties claiming the same. The Knights of the Maccabees having, for prudential reasons, not paid any claimant, but paid the money into Court, the Court must now determine who is the proper person to receive it: *Ballou* v. *Gile*, 50 Wis. 614; *Keener* v. *Grand Lodge A.O.U.W.* (1889), 38 Mo. App. 543.

There is no question, on the evidence, but that the insurance was effected for the defendant, Mary Ball. She is the person designated as beneficiary, although she may, strictly speaking, be mis-described as wife; and the only point for decision by us is whether she can be a legal beneficiary under the rules of the association. By section 174 of the Revised Laws of the Knights of the Maccabees, edition of 1899, it is provided:—"No life benefit certificate shall be made payable to any person other than the wife, husband, children, dependent, mother, father, sister, brother, aunt, uncle, nephew, niece, cousin, step-child, step-parent, half-sister or half-brother of the

member . . ." The defendant claims as "dependent," and it was argued to us, on the part of plaintiff, that the "dependent" in the section should be a person related by blood or affinity to the member. I am of the opinion that there is no room for the application of any doctrine of *ejusdem generis* or *noscitur a sociis*. The draftsman has carefully designated, in order of merit, the different kinds of beneficiaries. He has exhausted all the degrees of relationship, both by blood and affinity, nearer than the grand-parents or grand-children, extending the privilege even to step-parents; and it is perfectly manifest that it was intended that a dependent—that is, one who is sustained by the member or who relies on the member for support or maintenance—ranks next after wife, husband and children, apart from any question of legal relationship.

I do not consider that we are called on to generalize or moralize as to the relations of the parties. The defendant is not in the position of one who knowingly occupied the relation of concubine or mistress. It is quite clear that at the time that Philip Crosby went through the form of marriage with her, and for a long time afterwards, she was under the belief that his wife, the plaintiff, was dead. She is entitled to the fund in Court.

The position of a "dependent" has been considered in the following cases: *Main Colliery Company, Limited* v. *Davies*, [1900] A.C. 358; *McCarthy* v. *New England Order of Protection*, 153 Mass. 314; and the unreported, but well considered, portion of the judgment of Meredith, J., in *Styles* v. *Supreme Council of Royal Arcanum*, 29 O.R. 38, referred to in the note on page 40.

The appeal must be dismissed with costs.

STREET, J. [After stating the facts of the case as above]:—In my opinion we are not absolved by the payment of this insurance money into Court from determining according to law which of these claimants is legally entitled to it. The payment into Court has not changed their rights, but has only freed the assurers from further responsibility as to its application.

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I agree, however, in the finding that the defendant is entitled to the money as against the plaintiff, which is the question to be determined upon the issue sent down for trial.

It must be taken to be proved that the plaintiff was the lawful and only wife of the deceased, and that the defendant, though she had for many years before and down to the time of his death lived with him as his wife, believing herself during the greater part of the time to be his wife, was not in fact his wife at all. The fact that the policy is made payable by the deceased to Mary Crosby, his wife, coupled with the other fact that his wife's name was Harriet Teresa Crosby, raises a latent ambiguity, and allows the admission of parol evidence to explain the meaning of the writing. The evidence so admitted leaves no room for doubt that the defendant and not the plaintiff was the person intended by the description. The evidence further shews that the defendant, though not his wife, was living with him, believing herself to be his wife; that she was dependent upon him; that he supported her and was under a very strong moral obligation to do so. Under the Rule 174 of the order, under which the policy was granted, a policy may be made payable to a wife or a dependent: it might have been made payable in the first place to the defendant as a dependent had the facts been known. The person being ascertained, and she being a person who might take under the rule referred to, I can see no sound reason why she should not take in the character of dependent, although she can not do so in the character of wife.

The appeal should, therefore, in my judgment be dismissed with costs, and the money in Court should be ordered to be paid out to the defendant.

BRITTON, J., concurred.*

*September 5th, 1902. Leave to appeal to Court of Appeal refused.—Rep.

A. H. F. L.

[DIVISIONAL COURT.]

IN RE WILLIAMS.

D. C.
1902
July 31.

Trusts and Trustees—Remuneration—Fixed Annual Sum — Solicitor-Trustee—Profit Costs.

Held, following *Re Berkeley's Trusts* (1879), 8 P.R. 193, that the remuneration of trustees whose duties cover a period of years, should not be confined to an allowance by way of percentage for the collection and payment over of income, but it is proper to make to them an annual allowance for their services in looking after the *corpus* of the fund, receiving re-payments upon principal and re-investing, and this allowance should not depend upon the amount so collected and re-invested, but should be a fixed annual allowance based upon the nature of the property and the consequent degree of care and responsibility involved.

In this case trustees had from 1891 to 1902 taken care of an estate of $60,000, received re-payments of principal and re-invested them, and collected $39,700 of interest, being an average rate of about 6 per cent. per annum upon the fund.

Held, that an allowance of $100 a year for their duties in connection with the $60,000 of principal was a reasonable and proper one, while an additional 5 per cent. allowed by the surrogate Judge for collection and payment over to the parties entitled was not excessive when the nature of the securities, a number of small mortgages, was considered.

A solicitor-trustee who brings or defends proceedings in Court for himself and his co-trustee is entitled to recover profit costs and therefore to charge such costs to the estate, but such costs are not to be increased by the fact that he is himself a party beyond what they would have been had he acted for his co-trustee only. This, however, is not to be extended to proceedings or professional services rendered to the estate out of Court.

Cradock v. *Piper* (1850), 1 M. & G. 664, referred to.

APPEAL by G. M. Macdonnell, one of two trustees of an estate, against the judgment of the surrogate Judge of Frontenac fixing his remuneration for the period since August, 1891, at $1500.

The testator, Edward Williams, died on September 24th, 1889, and by his will appointed the appellant, a solicitor practising at Kingston, and one James Williams, a druggist carrying on business at Brockville, to be his executors and the trustees of his estate. Probate was granted to them and they entered upon their duties under the will. On August 24th, 1891, upon their petition, their accounts were audited by the Judge of the surrogate court at Kingston. It appears by the order then made that their total receipts of cash to June 4th, 1891, from collection of mortgages and debts due the testator, including principal and interest, were $25,071.22, and that their disbursements during the same period, including sums invested upon mortgage, were $24,478.69.

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The estate taken over by the executors at the testator's death amounted to $59,989.73 (including $4000 real estate and $800 household goods and furniture), and there was $4275.72 interest, which the executors collected. The Judge allowed the executors $1600 as their remuneration for their services to the date of the order, August 24th, 1891, made up as follows:—

2½ per cent. on the principal taken over, exclusive of real estate and household goods and furniture, say $55,200.....	$1380 00
5 per cent. on income collected by the executors, amounting to $4275.72.....	213 00
	$1593 00
Say.....	$1600 00

and this sum was accepted by them under the order. On March 10th, 1902, upon the petition of the executors, their accounts, down to June 16th, 1900, were again audited by the surrogate court Judge.

From these accounts it appeared that since the previous accounting the following had been the dealings of the executors with the estate:—

The appellant George M. Macdonnell had collected principal sums, being payment of principal, upon mortgages...	$41,785 19
And interest	37,083 44
Total receipts by Macdonnell.....	$78,868 63
And that the other trustee, Jas. Williams, had collected principal sums	$10,130 25
Interest.....	2,616 00
Total receipts by Williams.....	$12,746 25

That Macdonnell had during the same period disbursed $71,675.75, and Williams $11,003.49, the said sums being chiefly payments of interest to persons entitled under the will and reinvestments upon mortgages; and that there remained in their hands $8935.74 in cash and $50,950 in mortgages, besides certain accrued interest, thus shewing the total principal estate in their hands to amount to $59,885.74.

Upon these figures the learned Judge fixed the compensation of the appellant Macdonnell at $1500 and that of the other trustee, Williams, at $500. He adds that he allowed this sum as being 5 per cent. on the interest received by them, and that he allowed nothing on principal as he had allowed 2½ per cent. thereon on the former passing of accounts. The executor and trustee George M. Macdonnell appealed from this judgment, and his appeal was argued before the Divisional Court (FALCONBRIDGE, C.J.K.B., and STREET, and BRITTON, JJ.), on April 14th, 1902.

G. F. Shepley, K.C., for the appellant, cited *Re Berkeley's Trusts* (1879), 8 P.R. 193.

J. A. Hutcheson, for the other executor and the beneficiaries interested, contended that profit costs should not have been allowed: *Taylor* v. *McGrath* (1885), 10 O.R. 669, at p. 682; *Christophers* v. *White* (1847), 10 Beav. 523; *Harbin* v. *Darby* (1860), 28 Beav. 325; *Re Fleming* (1886), 11 P.R. 272, 426.

Shepley, in reply, contended that where the business is of such a kind that some solicitor must have done it, there is no reason why an executor-solicitor should not have his profit costs: *Strachan* v. *Ruttan* (1892), 15 P.R. 109; *Re Mimico Pipe and Brick Manufacturing Co.* (1895), 26 O.R. 289.

July 31. The judgment of the Court was delivered by STREET, J. [after stating the facts as above]:—The annual interest collected by the executors upon this estate of $60,000 appears to have averaged about $3600 a year for the past eleven years, being the period covered by the present order, and so far as can be gathered from the accounts, from a comparison of the position of the fund in 1902 with its position in 1891, and from the absence of any suggestion to the contrary, the estate seems to have been carefully managed.

I think we are warranted under the decision in *Re Berkeley's Trusts*, 8 P.R. 193, and the authorities there referred to, in holding that the remuneration of trustees whose duties cover a period of years, should not be confined to an allowance by way of percentage for the collection and payment over of income, but that it is proper to make to them an annual allowance for their services in looking after the corpus of the fund, receiving repayments upon principal and reinvesting it.

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Reasons are given why this allowance should not depend upon the amount so collected and reinvested, but should be a fixed annual allowance based upon the nature of the property and the consequent degree of care and responsibility involved.

What the trustees have done during the period from 1891 to 1902 has been to take care of an estate of $60,000, to receive repayments of principal and to reinvest them, and to collect $39,700 by way of interest, being an average rate of about 6 per cent. per annum upon the fund. For this the learned Judge below has allowed them altogether $2000, being, as he puts it, 5 per cent. upon the interest collected, and he has made no allowance of any kind for any other services, giving as a reason for not doing so that he had in his former order allowed them 2½ per cent. for taking over the principal.

I think an allowance of $100 a year for their duties in connection with the $60,000 of principal would be a very reasonable and proper one to make for the receipt of repayments on principal invested, their reinvestment, and the constant watchfulness and care required in order to guard from loss a fund invested upon ordinary securities. In addition to this the allowance of 5 per cent. made by the learned Judge for the collection of the interest and its payment over to the persons entitled under the will is by no means excessive when the nature of the securities is considered. These securities are a number of small mortgages upon which, while probably a larger rate of interest is obtained for the beneficiaries than upon other authorized trust securities, the care of management is greater. The result would be a charge to the trust in each year of about $280 in all for management, a sum representing less than one-half of 1 per cent. per annum upon the principal of the fund to cover the expenses of management.

For 9 years ending June 16th, 1900, the date of the accounts passed in 1902, the annual allowance for managing and caring for the principal would be	$ 900
For collection of interest, 5 per. cent. on $39,200	1960
	$2860
Three-quarters of this for appellant	$2145

I think Mr. Macdonnell, the appellant, should have been allowed $2145 for his services during the nine years, instead of the $1500 which the learned Judge proposed to allow him.

It appears from the papers before us, however, that a question was raised before the learned Judge below as to whether the appellant had not charged certain profit costs to the estate to which he was not entitled, and that this question has not yet been determined. It was argued before us although there was no formal appeal upon the point. The matter seems to stand thus: The general rule is that a trustee-solicitor is not entitled to charge the estate with any professional services, for to allow him to do so would be to violate the rule that a trustee is not to be placed in a position where his duty and his interest conflict. An exception however, which is not to be extended, has been established by the decision of Lord Cottenham in *Cradock* v. *Piper* (1850), 1 M. & G. 664, under which a solicitor-trustee who brings or defends proceedings in Court for himself and his co-trustee is entitled to recover profit costs and therefore to charge such costs to the estate, but such costs are not to be increased by the fact that he is himself a party beyond what they would have been had he acted for his co-trustee only. This exception is not to be extended to proceedings or professional services rendered to the estate out of Court: see *In re Corsellis, Lawton* v. *Elwes* (1887), 34 Ch. D. 675; *Broughton* v. *Broughton* (1855), 5 D. M. & G. 160; *Re Doody, Fisher* v. *Doody*, [1893] 1 Ch. 129, 138, 139, 141; *Re Mimico Pipe and Brick Manufacturing Co.*, 26 O.R. 289; Lewin on Trusts, 10th ed.

There appear to be charges in Mr. Macdonnell's accounts for professional services which do not come within the exception sanctioned by *Cradock* v. *Piper*, and these should be deducted. If there should be any dispute as to them the matter may be spoken to again and a reference ordered if necessary.

The costs of the appeal should be paid out of Court to all parties, to be taxed as between party and party.

A. H. F. L.

[IN CHAMBERS.]

1902

June 28.

RE PETTIT ESTATE.

Dower—Election—Proceeds of Sale of Deceased Husband's Land—Money in Court—Death of Widow—Payment out to Widow's Administrator—R.S.O. 1897, ch. 127, sec. 4, sub-sec. 2, sec. 11, sub-sec. 4—Ib. ch. 168, sec. 9.

The widow and administrator of a deceased owner of land sold the land with bar of dower, and the proceeds were paid into Court to her credit and that of the official guardian on behalf of an infant by a former marriage, she reserving her right to elect between the value of her dower and her distributive share in her husband's estate, one of which it was clearly understood she was to have out of the moneys in Court. Subsequently she elected in writing to take the former in lieu of "any other interest she might have in her husband's undisposed of real estate," and died shortly afterwards :—

Held, that her administrator was entitled to receive out of Court the value of her dower according to her expectancy at the time of sale.

THIS was an application by the Trusts and Guarantee Company, guardians of the estate of Charles Harold Pettit, a son of William J. Pettit, deceased, under Rule 972, for an order as to the distribution of the proceeds of the real estate of the said William J. Pettit, and the apportionment of the dower of the said Rebecca Ellen Pettit, under the circumstances set out in the judgment.

The motion was argued on June 20th, 1902, before BRITTON, J.

T. R. Atkinson, for the Trusts and Guarantee Company, guardians of C. H. Pettit.

M. E. Wells, for administrator *de bonis non* of William J. Pettit.

E. A. Du Vernet, for the administrator of the widow, Rebecca Ellen Pettit.

H. E. Harcourt, for the official guardian.

June 28. BRITTON, J.:—William J. Pettit in his lifetime was the owner of the middle westerly part of lot 13, 9th concession, of Townsend, in the county of Norfolk. He died on April 30th, 1898, intestate, leaving his widow Rebecca Ellen Pettit, and an infant child, by a former marriage, Charles Harold Pettit.

The widow took out letters of administration on May 20th, 1898, and shortly after, with the consent of the official

guardian, sold the land for $3000, giving the conveyance to the purchaser, and signing it not only as administratrix but also individually to bar her dower in that land.

It is stated, and not contradicted, that the land would not have realized $3000, even if it could have been sold at all to the man who bought, without the release of dower.

The whole purchase money ($3000) was paid into the Canadian Bank of Commerce to the joint credit of the administratrix and of the official guardian. The sale took place on March 11th, 1899, and the money was paid into Court, the administratrix reserving the right to elect as to whether she would receive a distributive share of the estate or the value of her dower in this land. It seems to have been clearly understood that she had at least a right to dower, and that the fund was in the bank out of which she would be paid a sum in lieu of dower, unless she elected to take her share; and in either case, what she was entitled to would be paid to her from this fund in Court—out of this money.

Nothing was done towards a settlement of this matter until September 6th, 1900, when the widow Rebecca Ellen Pettit executed what purports to be a declaration of election, after the recital, in these words: "I . . have elected and do hereby elect to take the value of my dower in said lands, to be computed upon the principles applicable to life annuities, in lieu and instead of any other interest I may have in my husband's undisposed of real estate."

She was sick when she made this declaration, and she died on April 8th, 1901, without fully administering the estate of her husband, and leaving this money in Court. Letters of administration to her estate have been granted to Edgar Burch, and letters *de bonis non* of the estate of William J. Pettit have been taken out by John Stickney. The Trusts and Guarantee Company, Limited, have letters of guardianship to the infant, Charles Harold Pettit.

The question for my determination is whether the widow Rebecca Ellen Pettit was in her lifetime entitled to any part of the proceeds of this land, and if so, is it a distributive share or the value of her dower.

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At the time of the sale of the land, and the conveyance of it, and all along, it was recognized that the widow was entitled to dower in this land, unless she should elect to take a distributive share of the proceeds under sub-sec. 2, sec. 4, R.S.O. 1897, ch. 127. She did not so elect. The document she signed was not such a "deed or instrument in writing" as is contemplated by that section. On the contrary, instead of electing to take her interest under that section in her husband's undisposed of real estate in lieu of all claims to dower, she said she would take the value of her "*dower in said lands to be computed upon the principles applicable to life annuities, in lieu and instead of any other interest,*" etc.

The solicitor, in drawing up this instrument for Mrs. Pettit to sign, evidently had in mind R.S.O. 1897, ch. 168, sec. 9, and also perhaps sec. 11, sub-sec. 4, of the Act respecting the Devolution of Estates, *ib.* ch. 127. I think it was the widow's intention, acting upon advice, that she should get, and she was satisfied with it, a gross sum in lieu of dower or in settlement of her dower. She signed the deed with the understanding that she was entitled to at least some amount in lieu of dower, that the money was paid into the bank to protect her, as well as the estate, and there is no reason why she should not be entitled to it. She was forty-six years of age when the land was sold, and her dower—interest calculated according to the tables, Appendix G, Scribner on Dower, 2nd ed.—would be $656.40.

It makes no difference that Mrs. Pettit died soon after this land was sold and the money paid into Court. The amount must be determined according to tables based on expectancy. It is her expectancy which is to be valued: see *McLaughlin* v. *McLaughlin* (1871), 22 N.J. Eq. 505. The cases referred to are *Re Rose* (1896), 17 P.R. 136; *Baker* v. *Stuart* (1898), 25 A.R. 445.

The order should go that the estate of William J. Pettit should be wound up; that out of the money paid into Court the estate of the widow should get $656.40, and interest at rate paid by the bank; and that the infant, Charles Harold Pettit, is entitled to the residue after payment of debts and costs.

Costs of all parties to this motion out of estate.

A. H. F. L.

[DIVISIONAL COURT.]

RE BRAMPTON GAS CO.

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Aug. 1.

Company—Winding-up Act—R.S.C. 1886, ch. 129—Claims Provable Thereunder—Fully Secured Creditors—Jurisdiction of Master.

Creditors holding fully secured claims, and content to rely on their security, without seeking to share in the distribution of the other assets, cannot be compelled to file their claims in winding-up proceedings under the Dominion Winding-up Act, R.S.C. 1886, ch. 129, and have them adjudicated upon therein; and where such creditors without any intention to submit to such adjudication had filed with the liquidator affidavits stating their claims as fully secured, leave was given them to withdraw the same.

THESE were appeals from the ruling of the Master in Ordinary that he had jurisdiction to determine the claims made by the appellants, and also the matters raised by the liquidator in his notice of contestation served on the appellants pursuant to the direction of the Master, and that he ought to exercise that jurisdiction.

The company was being wound up under the Winding-up Act, R.S.C. 1886, ch. 129, and amendments thereto.

The appellant the Bank of Montreal claimed to be the holder of ten mortgage debentures of the company for $500 each, secured by a mortgage on the assets of the company; and it claimed to hold them as security for two promissory notes made by the company and indorsed by one L. E. Dancey—one of them for $3,300, and the other for $350.

The appellant Blayney claimed to be the holder of other ten of the mortgage debentures of the company for $500 each, secured by the same mortgage, and also to be an unsecured creditor of the company for $208.61.

Neither of the appellants claimed to be entitled to prove for or to rank as creditors in respect of these mortgage debentures or the moneys secured by them, nor did the appellant, the Bank of Montreal, claim to prove for or to rank in respect of the promissory notes for which they claimed to hold the debentures as security.

The appellants admitted that their respective debts and claims were fully secured by the mortgage which they claimed to be entitled to the benefit of, but each of them sent in to the

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liquidator what was indorsed as being an affidavit to prove his claim.

The affidavit as to the claim of the appellant the Bank of Montreal set forth that the bank was the holder for value of the ten mortgage debentures which it claimed to be the holder of, and that they were held by the bank as security for the before mentioned two promissory notes, upon which there was said to be due the sum of $3,722.55; that the bank held no other security, and that the value of the security was the full amount of this indebtedness.

The liquidator disputed the validity of the mortgage debentures and the mortgage purporting to secure them, and alleged that, if valid, the debentures were issued by one of the officers or directors of the company in fraud of the company, and that the appellants were not entitled to them or to the moneys payable according to their terms.

The contest between the parties was as to the right of the liquidator to require the appellants to submit to these questions being tried and determined by the Master in Ordinary in the winding-up under the powers delegated to him by the order of reference.

This claim by the liquidator was given effect to by the learned Master in Ordinary by the ruling complained of by the appellants.

The judgment of the Master in Ordinary was as follows:—

April 21. THE MASTER IN ORDINARY:—Claims are made by the Trusts and Guarantee Company as trustee, and by the Bank of Montreal and J. D. Blayney as individual holders of debentures issued by this insolvent company on the 1st February, 1901, all of whom claim that the insolvent company is indebted to them in the sums which the said debentures represent, and that they are entitled to prove their respective claims and to rank on the assets in preference to the other creditors of the company under a mortgage in trust held by the Trusts and Guarantee Company, dated on the same day.

By the 16th and 39th sections of the Winding-up Act these claimants are enjoined from bringing actions to enforce their

mortgage and debentures against the property of the company now in the possession of the liquidator.

The liquidator impeaches the validity of both mortgage and debentures, and contends that they are not valid charges on the property of the company by reason of their not having been authorized by the company in the manner and form required by law.

Thereupon the claimants contend that this Dominion Winding-up Court has no jurisdiction to try the issues raised; or, in the alternative, that in view of the provisions of the Winding-up Act restricting the right of appeal, the Court ought to decline jurisdiction and refer the claims for trial in actions to be brought by or against them in one of the Provincial Courts.

This latter contention constructively applies to every claim, or contestation, under the Winding-up Act which is within the jurisdiction of this Court.

The claims are brought in under section 56 and following sections; and also under section 39 as to their mortgage, privilege or lien upon the effects or property of the company in the possession of the liquidator. These claimants could not enforce their mortgage and debentures unless by leave of this Court first obtained; but they have adopted the more expeditious course by filing claims so as to enforce their mortgage claims against the property of the company now *in custodiâ legis*, by the possession which the statute has given the liquidator.

Having brought in their claims, and asked that they be allowed as a first charge against the assets of the company, and then raising objection to the jurisdiction, places them in the anomalous position of both approbating and reprobating the jurisdiction.

The simple question to be decided in this matter is whether the relation of mortgagee, or chargee, exists between these claimants and the insolvent company in respect of its assets; and, if it does, whether they have a preferential charge or lien on the assets in priority to the ordinary creditors of the company?

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It may be noted here that it has been held by the English Court in *Re Life Association of England* (1864), 10 L.T.N.S. 833; *S.C.* 34 L.J.N.S. Ch. 64; and *Re Poole Firebrick and Blue Clay Co.* (1873), L.R. 17 Eq. 268, that the jurisdiction in winding-up cases is analogous to that in administration cases. But the Winding-up Act gives further powers in respect of the liabilities of shareholders and their loans, and payments of dividends out of capital (secs. 42-55); the liability of the executors of shareholders under sec. 48; the far-reaching and punitive jurisdiction under sec. 83—which is analogous to that under 165 of the English Act; and the jurisdiction to restrain litigants resident in foreign jurisdictions from bringing actions against the liquidator, as illustrated in *Baxter* v. *Central Bank of Canada* (1890), 20 O.R. 214, and *Re International Pulp and Paper Co.* (1876), 3 Ch. D. 594.

The commentary upon the exceptional jurisdiction conferred by sec. 165 of the English Act (amended in 1890)—from which our 83rd section is copied—by Lord Justice Giffard in *Mercantile Trading Co., Stringer's* Case (1869), L.R. 4 Ch. 475, at p. 493, illustrates the general scope and purpose of the Act.

And this being a decision of the English Court of Appeal, is binding on this Court under *Trimble* v. *Hill* (1879), 5 App. Cas. 342.

A similar conclusion can be drawn from the 39th section of the Winding-up Act that all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, lien or right of property upon, in or to any effects or property in the hands of the liquidator, may be obtained by an order of the Court, a clause which is not in the English Winding-up Act, but comes apparently from two sources—the Canadian Insolvency Acts of 1869, sec. 50, and of 1875, sec. 125, and the English Bankruptcy Acts of 1869, ch. 71, sec. 72, and of 1883, ch. 52, sec. 102. This section contains a statutory injunction against actions in other Courts affecting the assets of the insolvent company, in the words: All remedies sought or demanded for enforcing "any claim" upon property in the possession of a liquidator may be obtained by an order of Court on summary petition, and "not by action, suit, or other proceeding of any kind whatsoever."

The decisions of the Courts of the two jurisdictions are not entirely harmonious; but the Canadian decisions are in favour of the jurisdiction sought to be invoked by the liquidator in this case.

In *Archibald* v. *Haldan* (1870), 30 U.C.R. 30, it was held that creditors of an insolvent debtor who had proved in the insolvency proceedings, were within the operation of the Act of 1869; and also all persons who could prove on the estate, although they had not made themselves parties to the insolvency proceedings, and that under the words "all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, hypothec, lien or right of property upon, in or to any effects or property in the hands, possession or custody of the assignee, may be obtained by an order of the judge on summary petition, and not by suit," applied to proceedings between creditors and persons who had it in their power to become parties to the insolvency proceedings, and that in that respect the jurisdiction was like that of a private forum, or more properly a *forum domesticum.*

In *Dumble* v. *White* (1872), 32 U.C.R. 601, it was held that where mortgaged goods were placed in the possession of the mortgagor's assignee in insolvency, the mortgagee could not enforce his right of property to the goods except through the Insolvent Court.

The case of *Crombie* v. *Jackson* (1874), 34 U.C.R. 575, amplified the reference to the *forum domesticum* made in *Archibald* v. *Haldan.* Wilson, J., after quoting the words of the Act, said, at p. 581: "This language is very plain. The object was to establish a special tribunal in the first instance for the disposal of such matters for the benefit of the debtor and the creditors, to prevent litigation being carried on by any one prejudicial to the estate, to prevent the assets being dissipated by law suits, and to have all such matters decided upon promptly by a summary petition presentable at any time to the county court or to the Judge of it, and specific relief afforded at once if the applicant were entitled to it. . . . This method is certainly better for all parties than any remedy which replevin or a bill for specific performance would afford, and it is better than treating the assignee as a trespasser or a

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wrong-doer by some supposed or implied act of conversion, merely because by process or provision of law, he has performed a *quasi* public duty, not for his own benefit, but for others of whose rights he is the guardian."

In *Burke* v. *McWhirter* (1874), 35 U.C.R. 1, the same learned Judge, while admitting that the words of the section were very large and comprehensive, did not think they could be construed so as to effect a person not a creditor of the estate, nor having anything to do with the distribution of the estate, and who claimed the goods in question by an independent right as his own and denied that they are, or ever were, the property of the debtor. Further on he intimates that if the words of the section, "right of property upon, in, or to any effects or property" were read in their generality, "they would embrace every claim whatever upon, in or to any effects or property which the assignee had got hold of, although the debtor had not a particle of claim or title to the property."

In further confirmation of these authorities, it must be kept in view that it is the duty of this Court to see that the assets of the company are sold; and in the case of assets incumbered by a mortgage or lien, that the validity and amount of such mortgage and lien is judicially determined, as in Chancery sales, before such assets are offered for sale.

The English decisions under the Bankruptcy Act are to the same effect. *Morley* v. *White* (1872), L.R. 8 Ch. 214, and the subsequent proceedings reported at p. 1026, shew this; and in giving judgment Sir W. M. James, L.J., said (p. 1031): "It was absolutely necessary, in order to distribute the assets of the bankrupt among the creditors, to ascertain what the claims on those assets were, and it was manifestly a case for the application of the 72nd section, which was intended to enable the Court of Bankruptcy to determine all questions arising on those claims, so as to ascertain what the net assets were which were distributable among the creditors, and also to determine what were joint assets, and what were separate assets, and who were the separate creditors, and who were the joint creditors, and what their respective rights were."

An analogous jurisdiction to take partnership accounts and to make the surviving partner a party to the proceedings, was

affirmed in this Province by the present Chancellor, when Master in Ordinary, in the administration action of *Kline* v. *Kline* (1870), 3 Ch. Ch. 137, 161.

These references make it clear that this Winding-up Court is constituted the proper forum for determining all claims against the assets of the company "in the hands, possession or custody of the liquidator"—as these charged or mortgaged assets are—and which have to be realized for the creditors of the company.

And they shew that the policy of the Act is to keep within the control of one Court all the estate of the insolvent company; to settle there all claims of debt, privilege, mortgage, lien, or right of property upon, in or to any effects or property of such insolvent company in the simplest and least expensive way, and to distribute its assets among its creditors in the most expeditious manner possible, and not to have the proceedings of the Winding-up Court, or the distribution of the assets, delayed or impeded by, or dependent upon, outside or expensive litigation in other Courts. And to this I may add that the policy of the Judicature Act is in harmony: that in the one action all remedies to which parties may appear entitled to may be granted, "so that as far as possible all matters in controversy between parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

I must, therefore, hold that this Court has jurisdiction to try the issues raised in this matter; and that the validity of the mortgage and debentures must be ascertained before the assets can be offered for sale.

From this judgment the Bank of Montreal and J. D. Blayney appealed to the Divisional Court.

On May 9th, 1902, before a Divisional Court composed of MEREDITH, C.J.C.P., and MACMAHON, J., the appeal was argued.

G. F. Shepley, K.C., for the appellant the Bank of Montreal. The Master, under the Winding-up Act, R.S.C. ch. 129, has no jurisdiction to determine upon the validity of the mortgage debentures held by the bank as security for their debt. The

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Act does not apply to creditors who are willing to rely on their security alone and do not make any claim on the other assets of the estate. The affidavit made by the bank was filed with the liquidator, in answer to the liquidator's notice; but this was merely for the purpose of notifying him that they had security for their claim, and without any intention whatever of claiming to rank as creditors on the other assets of the estate: *Henderson* v. *Kerr* (1875), 22 Gr. 91; *Cameron* v. *Kerr* (1876), 23 Gr. 374; *Re David Lloyd & Co.* (1877), 6 Ch. D. 399; *Re Essex Land and Timber Co.* (1891), 21 O.R. 367; *Re Hess Manufacturing Co., Edgar* v. *Sloan* (1894), 23 S.C.R. 644. Even if the Master had jurisdiction, it was discretionary with him whether he should try the validity of such security or not, and he should have exercised his discretion by directing the trial of an issue to determine the question: *Re Mercantile Trading Co., Stringer's* Case, L.R. 4 Ch. 475; *Re Essex Centre Mfg. Co.* (1890), 19 A.R. 125; *Re Anglo-French Co-operative Society, Ex p. Pelly* (1882), 21 Ch. D. 492; *Re Lowenthall* (1884), 13 Q.B.D. 240; *Ex p. Reynolds* (1885), 15 Q.B.D. 169; *Ex p. Hazelhurst* (1888), 58 L.T.N.S. 591.

W. A. Skeans for the appellant J. D. Blayney, relied on the same grounds of appeal.

Hamilton Cassels, for the respondent, the liquidator. The Master had jurisdiction to adjudicate upon the validity of the mortgage debentures held by these creditors. Under the Act he occupies the position of the Court, with all the powers of the Court, and, amongst such powers, the power to look into all the assets of the estate, including such as may be held by secured creditors. These creditors, however, attorned to the jurisdiction of the Master by putting in their claims and submitting to have them dealt with in the liquidation proceedings, and they, therefore, could not afterwards object to his so dealing with them: *Bolt and Iron Co., Livingston's* Case (1887), 14 O.R. 211; *Re Sun Lithographing Co., Farquhar's Claim* (1892), 22 O.R. 57; *Harte* v. *Ontario Express, etc., Co., Molson's Bank Claim* (1894), 25 O.R. 247; *Re Iron, etc., Co.* (1889), 19 O.R. 43; *Re Farmers' Loan and Savings Co.* (1899), 30 O.R. 337.

August 1. Meredith, C.J.:—I am unable to agree with the ruling which has been made.

It is plain, I think, that the debts, for the proof of which provision is made by section 56 and the following sections which deal with the subject of proof of debts, are unsecured or only partly secured debts, in respect of which the creditor seeks to rank upon the general estate of the company in the liquidation, and have no application to fully secured claims where the creditor is content to rely upon his security and that only, and does not seek to share in common with other creditors in the distribution of the general assets of the company.

The provisions as to valuing securities (secs. 62, 63) are in entire harmony with this view. The secured creditor is required to put a "specified value" upon his security in order that the amount for which he is entitled to rank as an unsecured creditor may be ascertained. The residue of the debt, after deducting the amount of this specified value, is the sum for which the creditor may so rank, and the creditor is permitted to retain the property and effects constituting his security or on which it attaches. The liquidator may, however, require from the creditor an assignment of his security at the specified value to be paid to him, with interest from the date of filing the claim until judgment, by the liquidator, out of the estate so soon as he has realized the security.

Nor are these provisions applicable where there is a contest as to the right of the creditor to the security which he claims to hold for his debt. They are in their very nature applicable only where the right to the security is not disputed, and, as I have already said, are designed for the purpose of ascertaining for what sum the creditor is to be entitled to prove in the liquidation as an unsecured creditor.

Section 65 — which provides that no dividend is to be allowed or paid to a creditor holding security upon the estate of the company for his claim *until the amount for which he may rank upon the estate* as to dividends thereupon is established as provided by the Act—indicates plainly, I think, that the claims which this group of sections deals with are claims to be entered upon the dividend sheet and to receive dividends out of the general estate.

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Nowhere in the Act do I find any power conferred upon the Court in the winding-up to call upon any one who does not claim to rank as a creditor and to be entered upon the dividend sheet, to submit his right or title to any security which he claims to have upon the property of the company to adjudication by the Court, or anything which confers upon the Court jurisdiction to try the question of right in the winding-up.

That a secured creditor may come in and prove, or may rely upon his security, if he think fit to do so, is stated by Vice-Chancellor Bacon in *In re Kit Hill Tunnel, Ex p. Williams* (1881), 16 Ch. D. 590: and that he may do so, apart from some statutory provision limiting his right in this respect, is, I think, beyond question. Indeed, apart from the necessity of obtaining leave in the winding-up to bring his action (section 16), and subject to the provisions of section 39, it is the right of a debenture holder or mortgagee of the company to bring his action against the company to realize his security: 3 Palmer's Company Precedents (8th ed.), p. 475; Emden's Winding-up Practice (5th ed.), p. 61; *In re David Lloyd & Co., Lloyd* v. *David Lloyd & Co.* (1877), 6 Ch. D. 339; *In re Longdendale Cotton Spinning Co.* (1878), 8 Ch. D. 150; *In re Joshua Stubbs, Limited*, [1891] 1 Ch. 475; and the leave is granted almost as a matter of course, as appears from these cases.

The English cases referred to by the learned Master in Ordinary do not affect the question raised by these appeals. The observations of Lord Justice Giffard, quoted by him, and concurred in by the Lord Justices in *In re The County Marine Ins. Co., Rance's* Case (1870), L.R. 6 Ch. 104, are not of general application, but are confined to proceedings against directors and others for misfeasance, jurisdiction to deal with which in the winding-up is expressly given by the Act.

It is premature and unnecessary to discuss the effect of section 39 of our Winding-up Act. The appellants have not applied for leave to bring an action or to enforce their securities in this winding-up. If the effect of section 39 is to prevent their enforcing their securities except in the manner mentioned in the section, and the section is to be construed as the learned Master in Ordinary thinks that it

should be, it will be time enough to deal with that when such an application is made.

The course taken by the appellants in sending in their claims has led, I think, to the complications which have arisen; and though the ruling appealed from should be reversed, it is not, I think, unreasonable that the appellants should bear their own costs of the appeal. The costs of the liquidator will be paid out of the estate.

As there was, I think, no intention on the part of either of the appellants to submit to adjudication in the winding-up the question of the validity of their claims in respect of the mortgage debentures, they may if they see fit withdraw the claims sent in by them, and the appellant Blayney may have leave if he does so to send in an amended claim confined to proof of his unsecured debt.

MACMAHON, J., concurred.

G. F. H.

[IN CHAMBERS.]

1902
Sept 26.

REX EX REL. MCFARLANE V. COULTER.

Quo Warranto — Election of Reeve — Proceedings in County Court — Order of County Court Judge Setting Aside — Appeal.

A county court Judge having granted a fiat giving leave to serve a notice of motion, under section 220 of the Municipal Act, to set aside the election of a township reeve and the proceedings thereunder, which were entitled in the county court of which he was Judge, subsequently, on the respondent's motion, made an order setting aside the relator's whole proceedings from the beginning:—

Held, that no appeal lay from such order to a Judge of the High Court in Chambers.

Quære, whether the county court Judge had power to make such an order.

Owing to changes in the law, *Regina ex rel. Grant* v. *Coleman*, 7 A.R. 619, is no longer law.

THIS was an appeal from an order of the county court Judge of the county of Essex setting aside a fiat granted by himself giving leave to serve a notice of motion to set aside the election of a township reeve and the proceedings thereunder, which were entitled in the county court of the county of Essex.

The following facts are taken from the judgment of STREET, J., before whom the appeal was argued in Chambers on September 19th, 1902:—

On the 21st January, 1902, upon the motion of the relator, Samuel McFarlane, His Honour Judge Horne granted a fiat giving him leave, upon entering into the proper recognizance, to serve a notice of motion upon James A. Coulter, under sec. 220 of the Municipal Act, R.S.O. 1897, ch. 223, to set aside his election as reeve of the township of Colchester North.

The proceedings were taken and styled in the county court of the county of Essex, and the recognizance was duly entered into and filed and notice of motion served on the respondent, Coulter, on the 21st January, 1902.

On the 20th February, 1902, the respondent filed an affidavit in answer to the motion, and on the 24th February, 1902, the motion came on to be heard before His Honour Judge Horne.

The relator asked to be allowed to cross-examine the respondent on his affidavit, and for an enlargement of the motion to enable him to do so.

This was opposed by the respondent on the ground that there was no right to cross-examine on affidavits filed in these proceedings.

It was suggested that possibly admissions might be made which would avoid any difficulty of fact, and thereupon without deciding anything the Judge adjourned the hearing to the 11th March, 1902.

On the 28th February, 1902, the relator issued an appointment and subpœna to cross-examine the respondent on his affidavit, and the respondent gave notice of motion to set the appointment and subpœna aside.

On the 10th March, 1902, the respondent by leave of Judge Horne gave a notice of motion, returnable before him on the 11th March, 1902, to set aside the fiat, notice of motion under it, and all the proceedings in the relation, upon grounds therein disclosed.

On the 11th March, 1902, the relator's motion to set aside the election, and the respondent's motion to set aside the relator's fiat and other proceedings, were both adjourned to the 21st March, 1902. The respondent's motion to set aside the appointment and subpœna to cross-examine the respondent, was argued and judgment reserved.

On the 21st March, 1902, the two motions adjourned to that day came up, and further argument took place. What disposition was made then of the relator's motion to unseat the respondent does not appear, but the respondent's motion to set aside all the relator's proceedings was argued, and judgment was reserved upon it.

In April Judge Horne made an order setting aside the appointment to cross-examine the respondent on his affidavit. The relator appealed to a Judge in Chambers, and the appeal was brought on before Meredith, C.J., in Chambers, and stood over pending the motion of the respondent to set aside the relator's proceedings which had been argued on the 21st March, 1902.

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On the 1st August, 1902, the respondent's motion to set aside the relator's whole proceedings from the beginning was allowed, and an order made upon it setting them aside and quashing them with costs.

W. M. Douglas, K.C., for the appeal, cited *Dominion S. and I. Co.* v. *Kilroy* (1887), 12 P.R. 19; *Regina ex rel. Percy* v. *Worth* (1893), 23 O.R. 688; *Vansickle* v. *Boyd* (1892), 14 P.R. at p. 471, and *Regina ex rel. Grant* v. *Coleman* (1882), 7 A.R. 619.

J. H. Rodd, contra, cited *Regina ex rel. Mangan* v. *Fleming* (1892), 14 P.R. 458; *Regina ex rel. Grant* v. *Coleman* (1881), 8 P.R. 497, *ib.* 7 A.R. 619; *Regina ex rel. O'Dwyer* v. *Lewis* (1881), 32 C.P. 104; *Reg. ex rel. Campbell* v. *O'Malley* (1874), 10 U.C.L.J. 250.

No objection was taken on the argument to the jurisdiction.

September 26. STREET, J.:—This appeal must be dismissed upon the ground that no appeal lies from the order appealed against to a Judge in Chambers.

The proceedings here are entitled and carried on in the county court of the county of Essex, and appeals from county courts are given in ordinary cases to a Divisional Court and not to a Judge in Chambers.

Under the Consolidated Municipal Act of 1892, 55 Vict. ch. 42, sec. 187, sub-sec. 3 (O.), for the first time an appeal was given from the Judge trying the matter; the appeal given from the decision of a county court Judge trying the matter was to a Judge of the High Court. It is plain, however, that the appeal so given is not from any interlocutory proceedings but from the decision of the Judge upon the matter on the merits. No appeal is given except from the decision of the Judge "under this section;" and that which is referred to is the trial of the contested election, which does not include the quashing without a trial of the fiat upon which the proceedings are founded.

I express no opinion as to whether the county court Judge had any power to make the order appealed against. No such power is expressly given him, and unless he have it by

implication—which the Court of Appeal in *Regina ex rel. Grant* v. *Coleman*, 7 A.R. 619, thought he had not under the law as it then stood—then his duty was to go on and try the matter on its merits. The change in the law effected by the statute of 1892 is such as to render the decisions referred to in *Regina ex rel. Grant* v. *Coleman* no longer binding. The further change effected by the statute, ch. 1 of 2 Edw. VII., sec. 15, does not seem to affect the present application, which was launched before that statute was passed.

The appeal must be dismissed with costs.

G. A. B.

[DIVISIONAL COURT.]

D. C.
1902
Sept. 17.

THE MERCHANTS BANK OF CANADA v. SUSSEX.

Arrest—Ca. Sa.—Issue of Concurrent Writ after Expiry of Original—Con. Rule 874—Motion for Discharge—Appeal from Discretion of Judge—Discretion of Divisional Court—Suppression of Material Facts.

A concurrent writ of *ca. sa.* should not be issued after the original writ with which it is concurrent has expired by lapse of time under Con. Rule 874, and such a writ so issued will be set aside as having been improperly issued.

The right to make a motion for discharge from custody upon the merits and upon the ground of concealment by the plaintiff of material facts upon his application, founded upon Con. Rule 1047, is confined to the case of an order for arrest made before judgment and does not extend to a *ca. sa.*

The defendant had been arrested under an invalid concurrent writ of *ca. sa.*, and was in the custody of a sheriff to the knowledge of the plaintiffs' solicitor, who prepared an affidavit entirely suppressing the fact of the arrest, and upon which he obtained an order for and issued a new writ of *ca. sa.*

Upon an appeal to a Divisional Court from a judgment of a Judge in Chambers refusing to set aside the latter order and writ, and motion for discharge, it was

Held, that the application should not be treated as an appeal upon new material from the discretion of the Judge who made the order, as such an application having for its object the setting aside of the order and writ, must upon the authorities have failed: *Damer* v. *Busby* (1871), 5 P.R. 356, at p. 389. But was really one to the undoubted jurisdiction of the Court to set aside in its discretion orders which had been made by the wilful concealment or perversion of material facts, and that a clear case had been made out, and the order and writ should be set aside and prisoner discharged from custody.

Judgment of Falconbridge, C.J.K.B., reversed.

THIS was an appeal from a judgment of Falconbridge, C.J.K.B., and a motion to set aside an order for the issue of a writ of *ca. sa.*, and the writ of *ca. sa.*, and to discharge the defendant from custody.

The following facts are taken from the judgment of STREET, J., in the Divisional Court:—

On 14th January, 1902, the plaintiffs recovered judgment against the defendant for $737.50 and $34.70 costs.

On 21st May, 1902, upon the plaintiffs' application, an order was made by Falconbridge, C.J., under sec. 8 of ch. 80, R.S.O. 1897, for the issuing of a writ of *ca. sa.*, and one or more concurrent writs of *ca. sa.*, and a writ was thereupon issued on the same day directed to the sheriff of the county of Kent.

This writ was never acted on, and on the 16th August, 1902, the plaintiffs caused a concurrent writ to be issued

directed to the sheriff of the county of Lambton, under which the defendant was arrested and committed to close custody in the gaol of the said county, where he has ever since remained.

On 18th August, 1902, the sheriff communicated by telephone with the plaintiffs' solicitor, who lives at Bothwell, pointing out that the writ in his hands, under which he had arrested the defendant, was of doubtful validity under Rule 874, which limits the duration of such a writ to two months from its date, and asking for indemnity, which the plaintiffs' solicitor refused to give.

On the morning of the 19th August, a further conversation took place by telephone between the sheriff's solicitor and the plaintiffs' solicitor, in which it is said the sheriff's solicitor said he would not hold the defendant without indemnity, and the plaintiffs' solicitor says that he again refused to indemnify him.

On that day—19th August, 1902—the plaintiffs' solicitor procured the manager of the plaintiffs' office at Bothwell to swear to a new affidavit, in which the fact of the arrest was not mentioned, but in which the manager set forth certain facts occurring before the first order had been made, to the effect that the defendant had parted with his property in order to prevent its being taken in execution; that a *ca. sa.* had been issued to the sheriff of Kent, but that the defendant had evaded arrest, and had left for parts unknown to the deponent; that within the last few days the deponent had ascertained that the defendant was in the neighbourhood of Sarnia, in the county of Lambton; that he had not the slightest doubt that the defendant would, unless forthwith apprehended, quit Ontario with intent to defraud the plaintiffs; and that no part of the judgment debt had been satisfied, and the defendant had no assets in Ontario.

Upon this affidavit the plaintiff moved before Falconbridge, C.J., on 21st August, 1902, and obtained an order for the issue of a writ of *ca. sa.* to the sheriff of the county of Lambton, and this writ was thereupon issued and delivered to the sheriff, in whose custody the defendant had hitherto remained under the former concurrent writ of 16th August, 1902.

On 30th August, 1902, the defendant moved by leave of and upon notice before Falconbridge, C.J., to set aside the

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orders of 21st May, 1902, and 21st August, 1902, and the writs of *ca. sa.* issued upon them as aforesaid, "upon the ground that the plaintiff did not upon the applications for them disclose all the material facts, but on the contrary suppressed and misrepresented the facts; and upon the ground that the defendant did not part with his property or make any secret or fraudulent conveyance thereof in order to prevent its being taken in execution, nor was there any good or probable cause for believing that the defendant, unless forthwith apprehended, was about to quit Ontario.

"And for an order setting aside the concurrent writ of *capias ad satisfaciendum* issued upon the said order, and dated the 21st day of May, 1902, directed to the sheriff of the county of Lambton, and the arrest of the defendant thereon, *and ordering his discharge* from the county gaol of the county of Lambton, where he is at present confined, *upon the ground* that the original writ issued upon the said order, to which the said writ under which the arrest was made was concurrent, had expired, and was no longer in force, and upon the ground that the said concurrent writ had expired before the said arrest was made, and upon the ground that the said arrest was made without any legal authority whatever."

Upon the argument of the motion, an affidavit of the plaintiffs' manager at Bothwell was filed, in which he swore that when he made his affidavit for the arrest of the defendant on 19th August, 1902, he was not aware that the defendant was then under arrest by the sheriff of Lambton, but believed that the defendant was still at large, and that the former writ of arrest had expired.

The plaintiffs' solicitor also filed an affidavit stating his telephone communication on 18th and 19th August, 1902, with the sheriff of Lambton and his solicitor, and annexing a copy of a telegram sent by him on 18th August, 1902, to the sheriff, in which he said, "Do not act until further advised," and which telegram he sent after hearing from the sheriff that he had a writ in his hands for the arrest of the defendant: that it appeared to have expired, and asking what he should do. Various other affidavits upon the merits of the case were filed on both sides.

The learned Chief Justice gave judgment, refusing to set aside the orders.

From this judgment the defendant appealed, and moved to be discharged from custody upon the merits, and the appeal and motion were argued on the 12th September, 1902, before a Divisional Court composed of STREET and BRITTON, JJ.

J. E. Jones, for the defendant. The first writ of *ca. sa.* expired on July 20th, as it could only remain in force for two months: Con. Rule 874. The writ issued on the 16th August, as concurrent to an expired writ, was void *ab initio*, and the defendant's arrest under it was illegal: Con. Rule 310. On the 21st August a new order was obtained, and a writ issued upon an affidavit sworn the day after the arrest of the defendant, which suppressed the fact of the arrest, and misled the Court: *Barry* v. *Eccles* (1846), 3 U.C.R. 112; Con. Rule 358. It was sworn before the solicitor of the plaintiffs, contrary to Con. Rule 522. A Divisional Court can review both the order for arrest and the refusal to discharge: *Cartwright* v. *Hinds* (1883), 3 O.R. 384. *Gossling* v. *McBride* (1897), 17 P.R. 585, does not apply, as in that case the motion to set aside the order was not pressed, and the judgment relates only to the other branch of case. There was no *fi. fa.* issued: *Ross* v. *Cameron*, 1 C.L. Ch. 21.

J. H. Moss, contra. In *Ross* v. *Cameron* a *fi. fa.* had been issued and a seizure made, but the amount realized had not been credited, so the arrest was made for more than was due. The concurrent writ here is not void, and is a protection to the sheriff, who is not before the Court. Consolidated Rule 874 does not say a concurrent writ cannot be issued on the order after two months, but if issued, is only valid for two months. The evidence shews that the defendant threatened the plaintiffs that he would go away, which justified the manager's affidavit. The facts were fully before the Chief Justice, and he refused to set aside his own *ex parte* order on the ground that his judgment was not affected by the alleged suppression.

Jones, in reply, cited *Bank of Montreal* v. *Campbell* (1865), 2 U.C.L.J.N.S. 18.

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September 17. The judgment of the Court was delivered by STREET, J.:—The concurrent writ of *ca. sa.* to the sheriff of Lambton, issued on the 16th August, 1902, under which the defendant was arrested, was clearly improperly issued. It was issued by the local registrar at Chatham more than two months after the original writ with which it was concurrent had been issued; the original writ had expired by lapse of time under Rule 874, and a concurrent writ could not thereafter be issued. That writ must, therefore, be set aside as having been improperly issued after the lapse of two months from the issue of the original.

The defendant in his motion before us, besides appealing from the judgment of the Chief Justice, has made a substantive motion to be discharged from custody upon the merits, and upon the ground of concealment by the plaintiff of material facts in making the application.

It has been repeatedly held, however, that the right to make such a motion—being entirely founded upon Rule 1047, which itself is founded upon a succession of statutes—is entirely confined to the case of an order for arrest made before judgment, and does not extend to a *ca. sa.*: *Kidd* v. *O'Connor* (1878), 43 U.C.R. 193; *Bank of Montreal* v. *Campbell*, 2 U.C.L.J.N.S. 18; *Gossling* v. *McBride*, 17 P.R. 585.

There remains, therefore, to be disposed of the motion to set aside the orders of 21st May, 1902, and 21st August, 1902, upon the ground that the plaintiffs upon the applications for these orders, suppressed and misrepresented facts which it was their duty to have fully and fairly disclosed to the Court.

So far as regards the application of 21st May, 1902, nothing has been shewn in support of the motion to set aside the order then made, and that part of the motion was not pressed. But the order of 21st August, 1902, stands upon a very different foundation.

The plaintiffs' solicitor knew that the defendant had been arrested on the evening of the 18th August, 1902, under the expired concurrent writ of 21st May, 1902, by the sheriff of the county of Lambton; he had had a conversation with the sheriff upon the subject over the telephone, and he had a further conversation with the sheriff's solicitor upon the same

subject on the morning of the 19th August. He says that the sheriff, on the evening of the 18th August, said he would free the defendant unless indemnified, and that he refused to indemnify him, but he abstains from stating that he supposed the defendant had been freed by the sheriff.

With all these facts in his mind, he prepared an affidavit for the manager of the plaintiffs' office in Bothwell, and had it sworn by him on the same day—19th August—in which the following statements are made: "That in the month of May last I ascertained that the said defendant was in the neighbourhood of Bothwell, in the county of Kent, but was keeping secreted, visiting relatives. *That a ca. sa. for his apprehension was issued to the sheriff of Kent, but the defendant evaded arrest, and left for parts unknown to me.* That within the last few days I ascertained that the said defendant is *in the neighbourhood of Sarnia,* in the county of Lambton. That I have not the slightest doubt that the said defendant . . . *is about to and will,* unless he be forthwith apprehended, *quit Ontario* with intent to defraud the plaintiffs. . ."

It is only fair to the plaintiffs' manager, who swore to this affidavit, to say that he states in a later affidavit that when he swore to it he was not aware that the defendant was under arrest, but on the contrary that he believed the defendant was still at large.

The solicitor who drew and procured his client to swear to the affidavit above quoted, has undoubtedly been guilty of an inexcusable breach of his duty to his client and to the Court in concealing from them the true facts existing at the time the affidavit was sworn.

It is only necessary to compare the affidavit with the facts known to him at the time he drew it to appreciate that the facts have been concealed and distorted in a manner which cannot have been accidental. The Court was intentionally led to believe from the affidavit that the defendant had never been arrested; that he was at large near Sarnia, and that he was about to quit the Province, while the fact was that the solicitor knew that on the same morning, having been arrested on the previous day, he was still in gaol at Sarnia, and that he might be still there. But whatever his belief may have been, it was

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plainly his duty to have laid before the Court at all events the very material facts that the defendant had been arrested the evening before upon an invalid writ; that he had been in illegal custody down to that day, at all events, at the suit of the plaintiffs, and that he might still be so. The Court would then have been in a position to deal with the application with the same knowledge as that possessed by the solicitor, and would probably have followed *Re Alfred Eggington* (1853), 2 El. & Bl. 717, in holding that the defendant must first be absolutely discharged from his illegal custody before he could be arrested upon new process at the suit of the same plaintiff.

The Chief Justice in his judgment, now under appeal, expresses his guarded opinion that a knowledge of the true facts would have made no difference; but the facts actually laid before him were not such as to call his attention to the authorities.

In my opinion, this application should not be treated as an appeal upon new material from the discretion of the Chief Justice, who made the order of the 21st August. Such an application, having for its object the setting aside of the order and writ, must upon the authorities have failed: *Damer* v. *Busby* (1871), 5 P.R. 356, at p. 389.

The application is really one to the undoubted jurisdiction of the Court to set aside in its discretion orders which have been obtained by the wilful concealment or perversion of material facts. In my opinion, a clear case has been made out by the defendant for the exercise of that discretion, and the order of the 21st August, 1902, and the writ issued under it, should all be set aside, and the prisoner should be discharged from custody.

In setting aside the writs, however, a condition must be inserted in the order that no action be brought against the sheriff for the arrest or detention or for anything done under either of them: he was placed in a position of doubt and embarrassment by the action of the Court officer in issuing the first concurrent writ, at the instance of the plaintiffs' solicitor, after the expiry of the original, and the second writ placed in his hands was valid upon its face.

The appeal will, therefore, be allowed with costs, and the concurrent writs of 21st May, 1902, and of 21st August, 1902, and the order of 21st August, 1902, will all be set aside, and the defendant will be ordered to be discharged from custody, subject to the condition that no action is to be brought against the sheriff of Lambton for the arrest or detention of the defendant, or for anything done by him in obedience to or in alleged obedience to the terms of either writ.

The plaintiffs must pay the costs of the motion as well as of the appeal.

G. A. B.

[BOYD, C.]

1902
Sept. 26.

QUIRK v. DUDLEY.

Injunction—Oral Slander—Mind-reading.

Injunction granted until the trial to restrain the defendants, who professed to be mind-readers, and who had as such given, and who intended to repeat, public entertainments, pretending to give information as to the cause of the death of the plaintiff's husband, intimating that he met with his death at the hands of a supposed friend, and thereby suggesting the idea that a late partner of the deceased and the plaintiff were concerned in the matter.
Monson v. *Tussaud*, [1894] 1 Q.B. 671, specially referred to.

THE plaintiff Jennie Quirk brought this action against Walter Dudley and Gladys Dudley, endorsing her writ for $1000 damages for slander and for an injunction to restrain the defendants from in any way mentioning or alluding to the death of the plaintiff's late husband or the circumstances attending the same at the defendants' series of entertainments then being given at the city of Brantford, or elsewhere within the jurisdiction of this Court.

James Quirk, the plaintiff's late husband, died at Brantford on March 23rd, 1902, and at the time of the bringing of this action the cause of his death was the subject of a pending coroner's inquest. The defendants were travelling through Ontario giving mind-reading entertainments, and at time of action brought were at Brantford, and at a recent entertainment there the defendant Gladys Dudley, while supposed to be in a trance, assumed to give an account of the death of James Quirk, saying that he had been killed by a supposed friend, and that she could if asked give the name of the friend. On September 19th, 1902, the local Judge at Brantford granted an interim injunction till September 25th in the terms of the endorsement on the writ, upon an affidavit of the plaintiff deposing to the above facts, and stating that at the time of his death James Quirk was in partnership with one John J. Toole; that his death had caused a great sensation at Brantford and given rise to various rumours, some of which placed the responsibility of his death on the said Toole and the plaintiff; that since the defendants' entertainment such rumours had been revived, and the plaintiff subjected to great annoyance, and that the defen-

dants had announced their intention to take up again the subject of the death of James Quirk and give further particulars, which would still further injure the plaintiff's reputation at Brantford.

The plaintiff moved to continue this injunction until the trial.

The motion was argued on September 25th, 1902, before BOYD, C., in Weekly Court.

J. H. Couch for the plaintiff.

M. F. Muir, for the defendants, contended that this was not a proper case for an injunction; that the Court never interfered by injunction unless there was some question of property involved, and that to grant an injunction in this case would be to invade the province of the jury: *Fleming* v. *Newton* (1848), 1 H.L.C. 363; *Aslatt* v. *Corporation of Southampton* (1880), 16 Ch. D. 143; Kerr on Injunctions, 3rd ed., p. 502: Amer. & Eng. Enycl. of Law, 2nd ed., Vol. 18, p. 1120.

September 26th. BOYD, C.:—The complaint of the plaintiff as it comes before me on the affidavits is uncontradicted by any evidence for the defendant. It stands confessed, therefore, that there has been an attack upon the character of the plaintiff ventured upon at a public entertainment by means of suggestions that she has been privy to the violent death of her husband. The female defendant, posing as mind-reader, assumes when in a state of so-called trance to have before her mind's eye visualized the panorama of the assumed tragedy, and tells forth the details bit by bit. Some interesting additions appear to be reserved for future exhibitions or entertainments and to restrain these the intervention of the Court is sought.

Jurisdiction undoubtedly exists in libel or slander actions to restrain repetition of the defamatory things whether written or oral. This case appears to be outrageous, whereby in the most sensational manner, and to gather some admission fees, the public are given to understand that the plaintiff is mixed up in some way with the murder of her husband.

The mischief is enhanced by the fact that the revelations are published in the newspapers at Brantford, and all the while proceedings are pending concerning the manner of the hus-

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band's death before a coroner's jury impanelled in the same city, and before whom the inquest has been adjourned until December 2nd.

The principles laid down in *Monson* v. *Tussaud*, [1894] 1 Q.B. 671, are ample to meet this case. It was there said that irreparable injury would be done if the defendants were, by means of an exhibition of the plaintiff's effigy in or close by their Chamber of Horrors, to remind the public that the suspicion of an atrocious crime rested on the plaintiff. *Hermann Logg* v. *Bean* (1884), 26 Ch. D. 306, shews that oral slander may be restrained and that the Court has jurisdiction in a clear case (such as this appears to be on the affidavits) to restrain even that unruly member the tongue, nor is there any exception in favour of those who claim supernatural power.

I continue the injunction till the hearing or further order.

A. H. F. L.

[IN CHAMBERS.]

1902

Sept. 22.

FAIRFIELD V. ROSS.

Administrator ad Litem—Locus Standi—Con. Rules 194, 195.

The only living issue and heir at law of an intestate who had brought this action to set aside on the ground of undue influence a transfer of her property (heretofore made by the intestate to the defendant), applied for an order under Rules 194 or 195 appointing him administrator, or administrator *ad litem* of the deceased :—

Held, that the order could not be made either under Rule 194, for reasons given in *Hughes* v. *Hughes* (1881), 6 A.R. 373, 380; nor under Rule 195, which is not applicable to a case of a plaintiff who, without right or title, has commenced an action and then seeks to legalize his illegal act by an order of the Court.

THIS action was brought by the only living issue and heir-at-law of Melissa Fairfield, who died intestate on September 3rd, 1900, to have set aside and declared null and void a bill of sale of her personal property to the defendant Annie Ross, executed by the deceased on April 27th, 1900, and a deed of her real estate executed by her about the same date to the defendants Annie Ross and Hester Canniff, on the ground of undue influence, absence of consideration, and fraud.

The present motion was by the plaintiff for an order appointing him administrator, or administrator *ad litem*, of the estate and effects of the deceased.

By affidavit the plaintiff deposed that the property included in the above bill of sale and deed was all the deceased possessed at the time, and that at the time of her death she was possessed of no other real or personal estate; that he was the only living issue, heir-at-law and next of kin of the deceased; that it had become necessary in the course of this action to have a personal representative appointed of the deceased to represent her estate; and that in the event of the deed and bill of sale being set aside, he, the plaintiff, was the only person entitled by law to any share or interest therein.

It also appeared that this action came on for trial before Lount, J., at Belleville, on June 16th, 1902, when the trial was postponed for the purpose of having an administrator of the estate of Melissa Fairfield appointed, the defendants having objected that the plaintiff was not clothed with proper authority to bring the action at the time of commencing it.

The motion was argued on September 22nd, 1902, before BOYD, C., in Chambers.

H. L. Drayton, for the plaintiff, referred to Con. Rules 194 and 195.*

* Con. Rule 194. Where in an action or other proceedings it appears that a deceased person who was interested in the matters in question has no personal representative, the Court or a Judge may either proceed in the absence of any person representing his estate or may appoint some person to represent the estate for all the purposes of the action or other proceeding, on such notice as may seem proper, notwithstanding that the estate in question may have a substantial interest in the matters, or that there may be active duties to be performed by the person so appointed, or that he may represent interests adverse to the plaintiff, or that there may be embraced in the matter an administration of the estate whereof representation is sought; and the order so made and any order consequent thereon, shall bind the estate of such deceased person, in the same manner as if a duly appointed personal representative of such person had been a party to the action or proceeding, and had appeared therein.

195. (1) Where probate of the will of a deceased person, or letters of administration to his estate have not been granted, and representation of such estate is required in any action or proceeding in the High Court, the Court may appoint some person administrator *ad litem*.

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R. C. Clute, K.C., for the defendants, contended that an appointment of an administrator *ad litem* should only be made when it is incidental to a properly brought action; and that such an order is never made to give a person a *locus standi* to bring an action where he would otherwise not have one, and referred to *Hughes* v. *Hughes* (1881), 6 A.R. 373; *Rodger* v. *Moran* (1896), 28 O.R. 275, 280; *Dowdeswell* v. *Dowdeswell* (1878), 9 Ch. D. 294.

Drayton, in reply, cited Holmested and Langton on the Judicature Act, notes to Rule 195.

September 22. BOYD, C.:—This action is to recover the estate of a person deceased, who died without a will, and who conveyed the estate in question to the defendants before death. The action is brought by the sole next of kin, no personal representative having been appointed. The application is now to appoint the plaintiff by summary order under Rule 194. For reasons given in *Hughes* v. *Hughes*, 6 A.R. 373, 380, upon the original of this rule, I am precluded from making such an order as the case does not fall within the purview of the rule.

Nor do I think that an order under Rule 195 would help the plaintiff. That authorizes no more than the grant of limited administration *ad litem*, but the object of this suit is substantially to get in the whole estate. It involves general administration according to the practice of the Court: *Dowdeswell* v. *Dowdeswell*, 9 Ch. D. 294, 306, and Rule 196.* The very frame of the rule, to my mind, indicates that it is not applicable to the case of a plaintiff who without right or title has commenced an action and then seeks to legalize his illegal act by an order of the Court.

* Con. Rule 196. Where an order for general administration is not asked or required, or where it is shewn that an executor *de son tort* has taken possession of the bulk of the personal assets belonging to the estate of a deceased person, he may on the application of any one interested in the estate of the deceased, without the appointment of any personal representative, be required to account for any assets of the estate which have come to his hands; and where a case is made for the appointment by the High Court of a receiver of the estate of a deceased person who has no personal representative, the estate may be administered under the direction of the Court without the appointment of any person other than the receiver to represent the estate.

The rule applies to a case where "in an action," *i.e.*, an action validly begun by a competent plaintiff, "representation of an estate is required" as a condition for its effective prosecution, and then in a proper case an administrator *ad litem* may be appointed.

I refuse the application with costs.

A. H. F. L.

[DIVISIONAL COURT.]

REX V. JAMES.

D. C.
1902
July 18.

Criminal Law—Fruit Marks Act, 1901, 1 Edw. VII., ch. 27 (D.)—Fraudulent Packing—Possession for Sale—"Faced or Shewn Surface"—Meaning of.

The mere having in possession, for the purpose of sale, packages of fruit fraudulently packed, within the meaning of section 7 of the Dominion Fruit Marks Act, 1 Edw. VII., ch. 27, is an offence under the Act, and it is immaterial that no one was imposed on, and no fraud intended by the person charged with the offence.

"The faced or shewn surface" of the package mentioned in the said section is not limited to the branded end of such package, but applies to any shewn surface thereof.

THIS was a motion to quash a conviction made by the police magistrate of the city of Toronto on the 17th day of February, 1902.

The conviction was that Eben James "did, in the month of February, 1902, at the city of Toronto, sell, and have in his possession for sale, apples packed in eighteen packages, in which the faced or shewn surface gave a false representation of the contents of the said packages, contrary to sec. 7 of the Dominion Fruit Marks Act, 1 Edw. VII., ch. 27."

By section 7 "no person shall sell, or offer, expose or have in his possession for sale, any fruit packed in any package in which the faced or shewn surface gives a false representation of the contents of such package; and it shall be considered a false representation when more than fifteen per cent. of such fruit is substantially smaller in size than, or inferior in grade to, or different in variety from, the faced or shewn surface of such package."

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At the trial before the police magistrate it appeared that the defendant, a large fruit exporter doing business at the city of Toronto, had stored in a cold storage warehouse eighteen barrels of apples. The Government inspector saw ten of these barrels, the apples in which at the branded end thereof were of a superior quality to those in the other parts of the barrels, but it was admitted that these barrels were not intended for sale.

The other eight barrels had been exposed for sale and actually sold, and had been sent out of the defendant's warehouse, but, before being sold, the contents had been tipped out and shewn to the purchaser. The condition of these apples shewed that their faced or shewn surface was of a superior quality to the inner contents, and on being repacked after being so shewn were restored to their original condition.

On the 8th day of May, 1902, the motion was heard before a Divisional Court composed of MEREDITH, C.J.C.P., and MACMAHON, J.

J. D. Montgomery, for the motion. It is only necessary to deal with the eight barrels, for it is admitted that the ten barrels were not intended for sale. Then, as to the eight barrels, there is no evidence of a false representation. The purchaser knew of the contents of the barrels. They were tipped up and shewn to him, and he knew exactly what he was buying. As to what constitutes "faced or shewn surface." This means the branded end. If this is not so, then the Act is too indefinite to justify a conviction.

R. B. Beaumont, contra. There is clearly an offence within the meaning of the section. The mere having in possession for sale constitutes an offence. Here the apples were not only exposed for sale, but were actually sold. It is not necessary that a fraud should be intended and the purchaser imposed on. Then, as to the "faced or shewn surface:" this is not limited to the branded end. It refers to any shewn surface of the package. If this were not so, the purchaser could easily be defrauded. In order to do so, it would only be necessary to brand the top of the barrel, and then shew the bottom, which had been fraudulently packed, to

the purchaser; or the brand could be changed from one end of the barrel to the other, according as a vendor dealt with a purchaser or Government inspector.

July 18. MEREDITH, C.J.:—The conviction is in respect of eighteen packages of apples, and it is for selling and having in possession for sale the apples packed in these packages in which the faced or shewn surface gave a false representation of the contents of the packages.

Ten of the packages were, according to the admissions of the parties, in storage, and not intended for sale, and were not, in fact, sold, and as to them the conviction cannot be supported.

There must be to constitute an offence against the section either a selling, or offering, or exposing, or having in possession for sale and there was neither.

The other eight packages were exposed for sale and actually sold. An offence against the section was complete though no sale nor offer to sell had taken place. The having them in possession for sale is an offence against the section. This being so it is immaterial that when sold the purchaser was not imposed upon, because, as the fact was, the whole contents were tipped out of the packages for his inspection and he saw the quality of the bulk.

The Legislature, for the purpose of protecting the public against the frauds which the Act is designed to prevent, has chosen to make the law so stringent that the mere having in possession packages of fruit fraudulently packed, when the having in possession is for the purpose of sale, is an offence and we have no warrant for refusing to give effect to the law it has made, because in the particular case no one was imposed upon, and no fraud was intended by the person charged with the offence.

I do not understand that it is questioned that eight packages were fraudulently packed within the meaning of the section. The third admission which is designed to raise the question as to what is the "faced or shewn surface" of a package appears to apply only to the ten packages as to which we have found that no offence is shewn to have been committed. As at present advised I do not see why the branded end of the

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package is the only place where a "faced or shewn surface" may be found, or why if the bottom of the barrel is faced with fruit of a better quality than the bulk that is not enough to bring the case within the section. As pointed out by Mr. Beaumont, if it were otherwise the provisions of the section might be easily evaded, and purchasers imposed upon by the bottom of the barrel being opened and the fraudulently packed surface exhibited to the purchaser.

The conviction must be amended by confining it to the eight packages, and the offence to having them in possession for sale, and the fine will be reduced to $2.00.

There will be no costs to either party.

It would be well, I think, if the Act were amended by defining the meaning of the terms of "the faced or shewn surface," and possibly also by relieving from the penalty one who has in possession for sale packages fraudulently packed, if he is able to shew that he did not know of the fraudulent packing and was not negligently ignorant of it.

G. F. H.

[LOUNT, J.]

BAXTER V. JONES.

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Aug. 15.

Principal and Agent—Insurance Agent—Agreement to Give Notice of Further Insurance—Omission to do so—Liability.

An insurance agent who, in consideration of his being given the right of effecting insurance against fire in companies represented by him, undertakes to attend to the insurances, to see that the policies are duly made out, and to give the necessary notices required to be given from time to time, but upon a further insurance being subsequently effected through him, omits to give any notice thereof, whereby the insured were damnified, is liable for the damages sustained by reason of his omission.

THIS was an action against an insurance agent for damages sustained by reason of his alleged negligence. The facts appear in the judgment.

The action was tried at Hamilton before LOUNT, J., on the 27th day of May A.D. 1902.

Riddell, K.C., and *L. F. Stephens*, for the plaintiffs.
Shepley, K.C., and *Washington*, K.C., for the defendant.

August 15. LOUNT, J.: — The plaintiffs' claim is for damages sustained by them through the negligence of the defendant in omitting to give notice to certain insurance companies in which the plaintiffs' mills, machinery and property were insured, of a further insurance for $500 on part of the same property, which notice the plaintiffs say the defendant undertook and agreed to give.

The plaintiffs are millers carrying on the milling business at Burlington, in the county of Halton, where the premises and property are situated. The defendant is an insurance agent at Hamilton.

On the evidence I find the facts to be as follows :—Early in January, 1900, and before the insurance hereafter mentioned had been effected, the defendant, having learned from R. G. Baxter, the president and manager of the plaintiffs' company, that the plaintiffs were about obtaining insurance on their mill property, machinery, etc., solicited from Baxter such insurance to be effected in companies represented by him, promising and

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undertaking if such insurances were given to him to effect that he would see after the insurance and see that the policies were all made out correctly, and that he would give all the necessary notices of any changes that might be made; that he would take care of the insurances and attend to them. Shortly after and in the same month such insurances were placed by the defendant in four insurance companies. In December following changes in the insurance were made by the plaintiffs through the defendant; and subsequently the plaintiffs, desiring to place a further insurance of $500 on the general machinery in their mill, about the 17th day of January, 1901, saw the defendant and arranged with him to effect such insurance. On the 21st of same month the plaintiffs signed an application for insurance in the Millers and Manufacturers Insurance Company. At the time of signing this application the defendant undertook and agreed with Mr. Baxter, representing the plaintiffs, to see that the other insurance companies then having insurance on the plaintiffs' property should get due notice from him of this $500 insurance, and that he would take care and have this done. On the 21st January, 1901, the policy was issued to the plaintiffs, but the defendant neglected and omitted to give, and did not give or cause to be given, the said notices. A fire took place in April following, wholly destroying the insured premises and property. The loss was a total one. When the plaintiffs claimed from the insurance companies the amount covered by the policies, the companies disputed the claims because they had not received notice of this insurance for $500. After considerable contention between the plaintiffs and the companies as to liability and as to the amount to be paid to the plaintiffs, the plaintiffs agreed to a compromise, accepting as payment in full of their whole claim, the amount of their claim less $1000, and this amount was paid to them by the companies, for which they gave receipts in full. The defendant was fully aware of the negotiations for settlement, and knew at the time the plaintiffs were holding him liable for any loss which they might sustain by reason of his neglect to give notice. He made no objection to the negotiations for settlement, or to the settlement, but approved of the same, as his conduct and letters shew; nor did he

deny that he had agreed to give the notices; on the contrary by letter, and when examined as a witness, he admitted the agreement, but he said he had forgotten to give the notices.

In my opinion upon these facts judgment must be for the plaintiffs.

In 1 Smith L.C., 10th ed., p. 182, it is said that *Coggs* v. *Bernard* (1703), 2 Lord Raym. 910, is authority for the proposition "if a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it:" *per* Willes, J., in *Skelton* v. *London and North Western Railway Co.* (1867), L.R. 2 C.P. 631, 636; so also in Addison on Contracts, 9th ed., at 789, it is laid down in reference to gratuitous undertakings to perform work, that "if the promisor do not proceed on the work, no action will lie against him for the misfeasance; but 'if he proceeds on the employment he makes himself liable for any misfeasance in the course of that work.'"

The defendant undertook the performance of an act or undertaking which was a part of the arrangement or undertaking to receive the application, effect the insurance and give the necessary notices to the companies entitled to notice, the importance of which he was well aware of. He also knew that the failure to give notices would void and invalidate the policies in the other companies. This he admits. By his failure to give the notices required, he was guilty of a misfeasance.

"If . . a party undertakes to procure an insurance for another, and proceeds to carry his undertaking into effect by getting a policy underwritten, but deals so negligently with the policy that the benefit of the insurance is totally lost to the party for whom he promised to effect it, he is liable to an action:" *Wilkinson* v. *Coverdale* (1793), 1 Esp. 76, referred to in Addison, 9th ed., 789; 1 Smith L.C., 9th ed., 183; and Anson on Contracts, 9th ed., 90 and 341. See also *Maydew* v. *Forrester* (1814), 5 Taunt. 615.

The plaintiffs, in my opinion, through the negligence of the defendant, sustained damages to the amount claimed. The property insured was a total loss. There was no salvage. This is admitted by the defendant. The settlement made by the plaintiffs with the companies was the best that could be

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done at the time. Had the plaintiffs insisted on full payment of their claims, in my opinion, they would altogether have failed, and the liability of the defendant would in that case be much greater.

Judgment for the plaintiffs for $1000 damages, with costs.

G. F. H.

[IN THE COURT OF APPEAL.]

PROVIDENT CHEMICAL WORKS v. CANADA CHEMICAL MANUFACTURING COMPANY.

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Trademark—Fancy Name—Descriptive Letters—Forum—Exchequer Court.

The letters C.A.P., standing for the words "cream acid phosphates," a fancy name for acid phosphates manufactured by the plaintiffs, were held to constitute a valid trademark, and an injunction was granted against the use thereof by the defendants, who had used these letters in the sale of goods of the same class, but ostensibly as standing for the words "calcium acid phosphates."

Judgment of Meredith, C.J., 2 O.L.R. 182, reversed.

The amendments to the Exchequer Court Act since the decision in *Partlo* v. *Todd* (1886), 12 O.R. 175, (1887), 14 A.R. 444, (1888), 17 S.C.R. 196, have not had the effect of giving that Court exclusive jurisdiction to adjudicate as to the validity of a registered trademark, and in answer to an action in the High Court of Justice for Ontario to restrain the infringement of a registered trademark, its invalidity may be shewn.

AN appeal by the plaintiffs from the judgment of Meredith, C.J.C.P., reported 2 O.L.R. 182, in an action to restrain the defendants from infringing the plaintiffs' trademark, "C.A.P.," as applied to acid phosphates sold by them, was argued before ARMOUR, C.J.O., OSLER, MOSS, and LISTER, JJ.A., on the 24th, 27th, 28th, and 29th of January, 1902.

F. P. Betts, and *Hume Cronyn*, for the appellants.

Shepley, K.C., and *E. W. M. Flock*, for the respondents.

The facts are stated in the report below, and many of the authorities relied on are there referred to. Among the additional cases cited and commented on in this Court were *Cash* v. *Cash* (1901), 84 L.T.N.S. 349; *Grand Hotel Co.* v. *Wilson* (1901), 2 O.L.R. 322; *London General Omnibus Co.* v. *Lavell*, [1901] 1 Ch. 135; *Kinahan* v. *Kinahan* (1890), 45 Ch. D. 78; *Kinahan* v. *Bolton* (1863), 15 Ir. Ch. R. 75; *Seixo* v. *Provezende* (1865), L.R. 1 Ch. 192; *Massam* v. *Thorley's Cattle Food Co.* (1880), 14 Ch. D. 748; *Thompson* v. *Montgomery* (1889), 41 Ch. D. 35, [1891] A.C. 217; *Payton* v. *Snelling*, [1901] A.C. 308; *Eastman Photographic Materials Co.* v. *Comptroller General of Patents*, [1898] A.C. 571, at p. 583; *Shaver* v. *Heller & Merz Co.* (1901), 48 C.C. Ap. 48; *Rumford Chemical Works* v. *Muth* (1888), 35 Fed. Rep. 524.

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September 19. The judgment of the Court was delivered by Moss, J.A.:—This action was brought to restrain the defendants from violating the rights which the plaintiffs claim to be entitled to as the registered proprietors of a certain specific trademark, consisting of the letters or characters "C.A.P.," used in connection with the manufacture and sale by the plaintiffs of powdered acid phosphate of lime for use as an ingredient in the production of baking powder. It came on for trial before Meredith, C.J., who dismissed it. The plaintiffs thereupon appealed to this Court.

Their first contention is that the learned Chief Justice erroneously held that it was open to the defendants to impeach in this action the plaintiffs' title as registered proprietors of the trademark upon which they rely. It is contended on the plaintiffs' behalf that *Partlo* v. *Todd* (1886), 12 O.R. 175, (1887), 14 A.R. 444, and (1888), 17 S.C.R. 196, no longer governs, owing to subsequent legislation; and that the defendants are not now entitled to attack, by way of defence, the plaintiffs' right to register or put forward as a trademark the letters or characters in question. It is argued that the effect of 54 & 55 Vict. ch. 26, sec. 4, and 54 & 55 Vict. ch. 35, sec. 1, amending R.S.C. ch. 63, is to vest in the Exchequer Court of Canada the sole jurisdiction to adjudicate upon the validity of a trademark, and so the Provincial Courts have no longer jurisdiction to entertain, in an action for infringement of a registered trademark, a defence to the effect that the plaintiff is not the proprietor of the trademark, or that it is not one capable of registration. *Partlo* v. *Todd* was decided under 42 Vict. ch. 22 (D.), now R.S.C. ch. 63. It was held that there was nothing in that Act to prevent a defendant in an action complaining of an infringement of a registered trademark, from impeaching the validity of the trademark or the plaintiff's title thereto. It was there contended for the plaintiff that under the Canadian Act a defendant was not even in as advantageous a position as a defendant in England, who, under the Imperial Act, might question the alleged trademark provided five years or more had not elapsed since the registration. But it was pointed out that it was open to question whether a defendant in England might not impeach a registered mark by

way of defence even after the lapse of five years from registration. And it was clearly determined upon the construction of the Canadian Act, that the only action which it authorized to be brought as for an infringement of a trademark was an action by the proprietor of the trademark who had registered under the provisions of the Act; that the certificate of registration was only *primâ facie* evidence of these facts, and that it was open to the defendant to shew that the plaintiff was not the proprietor of a trademark when he registered, and that what he had registered was not capable of registration as a trademark for the exclusive use of the party registering. In other words that mere registration did not create a trademark, but that before registration the party seeking to register must have acquired the proprietorship of the mark, name, brand, label, package or other business device which he procured to be registered for his exclusive use; and that the register or certificate of registration was not conclusive, and did not preclude a defendant from impeaching a plaintiff's right or title. The first amendment of the law, after *Partlo* v. *Todd*, was by 53 Vict. ch. 14 (D.), which substituted a new section for sec. 11 of R.S.C. ch. 63. The effect of it was to refer to the Exchequer Court of Canada the decision of any question arising where a person made application to register as his own any trademark which had been already registered, and the Minister of Agriculture was not satisfied that such person was undoubtedly entitled to the exclusive use of such a trademark. This section only extended the jurisdiction of the Exchequer Court to that particular class of cases, and it saved the jurisdiction "as to any question arising thereunder" which any other Court possessed.

By 54 & 55 Vict. ch. 35, this Act was repealed and new sections were substituted for sections 11, 12 and 33 of R.S.C. ch. 63. By section 11 the Minister of Agriculture is empowered to refuse to register in certain cases. He may, however, "if he thinks fit," refer the matter to the Exchequer Court, and in that event such Court is to have jurisdiction to hear and determine the matter, and to make an order determining whether, and subject to what conditions, if any, registration is to be permitted. This is a limited jurisdiction

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and only to be exercised in case the Minister of Agriculture, instead of determining the question for himself, thinks fit to refer it. By section 12 the Exchequer Court is empowered on the information of the Attorney-General, or at the suit of any person aggrieved by any omission without sufficient cause to make any entry on the register of trademarks, or by an entry made therein without sufficient cause, to make such order for making, expunging or varying the entry as it thinks fit, and to "decide any question that may be necessary or expedient to decide for the rectification of such register." The Court may also entertain an application by the registered proprietor of any regis ered trademark to add to or alter such mark in any non-essential particular. And the register is to be rectified or altered in conformity with any order of the Court pronounced under these powers. Nothing is added to the provisions of the Revised Statutes bearing on the effect of the register as rectified or altered.

By 54 & 55 Vict. ch. 26 (D.), intituled an Act further to amend the Exchequer Court Act, it is enacted (sec. 4) that the Exchequer Court shall have jurisdiction as well between subject and subject as otherwise, (a) in all cases of conflicting applications for any patent of invention or for the registration of any copyright trademark or industrial design, (b) in all cases in which it is sought to have any entry in any register of copyright trademarks or industrial designs made, expunged, varied, or rectified, (c) in all other cases in which a remedy is sought respecting the infringement of any patent of invention, copyright, trademark or industrial design.

The provisions of these two Acts, while extending the jurisdiction of the Exchequer Court so as to enable it to deal with doubtful or conflicting applications for registration, and with suits or applications to make, expunge, vary, or rectify entries on the register, and even to entertain actions for injunctions or damages for infringement, do not extend or enlarge, or assume to extend or enlarge, the effect of registration or the certificate thereof. The certificate is still only *primâ facie* evidence of the facts stated therein, and there is nothing in the legislation depriving a defendant of the right to shew that the facts were not truly stated, and that in truth there were no good

or valid grounds for registering the alleged trademark. This may lead to the somewhat anomalous result that a Provincial Court, in an action for infringement, may decide as to the validity of a trademark in one way, while the Exchequer Court, on an application to expunge or rectify the register, may decide the contrary. But if the proprietor chooses to invoke the aid of the Provincial Court, instead of resorting, as he may do, in the first instance to the Exchequer Court, the defendant is entitled to the judgment of the tribunal upon the question of the plaintiff's title if he desires to raise it. The Exchequer Court is not expressly given exclusive original jurisdiction in regard to the classes of cases enumerated in section 4, but by section 5 it is given exclusive jurisdiction in cases of claims to public lands. I think that it was open to the defendants in this case to impeach the plaintiffs' right to the trademark which they put forward as the foundation of the action.

But, with much deference, I am unable to agree with the learned Chief Justice's conclusion against the trademark. I agree that under our law, as under the English law, a merely descriptive word or name, that is, a word or name which merely denotes the goods or articles, or some quality attributed to them, is not capable of acquisition or proprietorship as a trademark, but I fail to see how the three letters claimed by the plaintiffs fall within this category. By themselves they do not describe any kind or quality of goods or articles. And they could only acquire any significance in the trade or upon the market by being so applied or attached to goods for sale in the market, as to distinguish them from similar goods, and to identify them with a particular manufacturer or trader, as made, produced, or sold by him: Kerly on Trademarks, 2nd ed., p. 24. And if these letters have been shewn to fall within the definition, they were capable of registration as a trademark under sec. 2 of R.S.C. ch. 63. The words of this section are much more general than the definition of trademark under the Imperial Acts; and the decisions of the English Courts since 1875, except in respect of cases falling within the provisions of section 64 (3) (11) of the Imperial Act, 46 & 47 Vict. ch. 57,

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as amended by 51 & 52 Vict. ch. 50, are not to be too readily accepted as authorities.

I think it is shewn that the letters in question were applied by the plaintiffs to a special kind of acid phosphate produced by them as early as the year 1884 or 1885; that they have ever since been used by the plaintiffs in connection with the same kind of acid phosphate; that acid phosphate has been ordered of and supplied by them under the designation "C.A.P.," and has become known by reference to these letters as the plaintiffs' product; and that the letters "C.A.P." have became identified with the plaintiffs' acid phosphate. As early as 1886 they were deemed entitled to be registered as a trademark in the United States; and since 1890 or 1891, at least, the plaintiffs' acid phosphate has been ordered and sold extensively in Canada by reference to these letters; and the plaintiffs' product has been distinguished from others by reference to these letters among traders and others dealing in acid phosphate as an ingredient for use in making baking powder.

Upon the evidence I see nothing to hinder the registration by the plaintiffs of the letters "C.A.P." as a trademark falling within the definition contained in section 2 of the Revised Statute. It is said that these letters are but the initials of the words "cream acid phosphates," and that these words are merely descriptive of the goods or articles. Granting this to be so, I do not think it can make any difference in the plaintiffs' right to the trademark which they have registered. It is undisputed that in the first instance the plaintiffs gave the name "cream acid phosphate" to their production. But this was soon condensed to the letters "C.A.P.," and it is these which have been so applied to and associated with the product as to distinguish it from others, and identify it with the plaintiffs as the manufacturers or producers of it. The majority of dealers know nothing of the origin of the letters, except as they have since been told; and it appears to me that their origin is unimportant. But if it is to be considered, I am by no means convinced that the three words, "cream acid phosphate," would be deemed so exclusively descriptive, and so devoid of any quality of distinctiveness, as not to be capable of being treated as a trademark. If the word "cream" be eliminated, the

remaining words are merely descriptive of the goods or article: see *Rumford Chemical Works* v. *Muth*, 35 Fed. Rep. 524. But "cream" is an important and governing word. By itself it is not at all descriptive of the particular kind of goods or article, or of any part of them. It is not an ingredient of the composition, or of any part of it. I see no special reason why the word "cream" applied to the words "acid phosphate," or used in connection with them, should not be capable of acquiring, along with them, a meaning designatory of the particular goods or product; and so, under proper conditions, becoming a valid trademark. There appears to be no more objection to cream acid phosphate than to "Medicated Mexican Balsam" [*Perry* v. *Truefitt* (1842), 6 Beav. 66]; "Ethopian Black Cotton Stockings" [*Hine* v. *Lart* (1846), 10 Jur. 106]; "Excelsior White Soft Soap" [*Braham* v. *Bustard* (1863), 1 H. & M. 447]; "Cocoaine Hair Oil" [*Burnett* v. *Phalon* (1867), 3 Keyes 594]; or, "Imperial Soap" [*Crawford* v. *Shuttock* (1867), 13 Gr. 149].

But the plaintiffs are not claiming that these words are a trademark, or their trademark. Their trademark consists of the three letters "C.A.P.," and I fail to see how their rights in that mark are affected by its appearing that A. and P. are the initial letters of "acid" and "phosphates" respectively; or why these three letters, when used in connection with acid phosphates, should be deemed merely descriptive of acid phosphates generally, and not of acid phosphates of a particular kind produced by a particular manufacturer. In my opinion, therefore, the plaintiffs had a good trademark which they validly registered on the 24th of July, 1900.

The defendants have used, and are using, the letters "C.A.P." in connection with the sale of acid phosphates made by them. Before the year 1897 they had made and sold acid phosphate but had designated it acid phosphate of calcium, or calcium acid phosphate. But in 1897 they began to use the letters "C.A.P.," and to connect them in such a way with the sale of acid phosphates as to be, in fact, a copy of the plaintiffs' trademark. They say that they were unaware of the plaintiffs' mark, and did not know of it until their attention was called to it in April, 1900, by a letter from the plaintiffs. On the

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other hand, it is shewn in evidence, that during all the years in which the defendants have been making and selling acid phosphates, the plaintiffs have been selling their acid phosphate as "C.A.P." to dealers in Canada, some of whom were, at the same time, dealing with the defendants as well. The defendants say they adopted the letters "C.A.P." as an abbrevation for calcium acid phosphates, merely intending to use the initial letters of these three words. They do not appear, however, to have always adhered to that course. In their advertising cards and letters and bill heads they print "Acid Phosphate C. A. P.," thus giving the letters a most pointed significance in connection with acid phosphate. The stencil mark upon their barrel heads is an actual copy of the three letters from the plaintiffs' trademark. A more distinct copying of the plaintiffs' trademark could hardly be shewn in any case. The defendants deny intention to copy or imitate the plaintiffs' mark, and argue that no person has been deceived. But where the plaintiffs shew an actual copying of their registered trademark, they are not required to go further. The Act gives them the exclusive right to use the trademark to designate the article manufactured or sold by them; and the defendants cannot, either knowingly or innocently, infringe upon that right. Under the English Act the same rule prevails: *Edwards* v. *Dennis* (1885), 30 Ch. D. 454, at p. 471; *Lambert* v. *Goodbody* (1902), 18 Times L.R. 394.

It was objected that the plaintiffs were guilty of delay, or that they had acquiesced in the defendants' use of the letters. But it is shewn that they only became aware of the defendants' user of them in the early part of 1900, when they immediately wrote protesting and requesting a discontinuance. This was followed by interviews between the solicitors and parties, and further correspondence, during which the defendants asked the plaintiffs for delay. On the 5th of October, 1900, the defendants' solicitors wrote that their clients declined to abandon the use of the letters "C.A.P.," and claimed that they had a right to use them notwithstanding the plaintiffs' registration of their trademark, and on the 25th of October, 1900, this action was commenced.

The plaintiffs seem to have actively asserted their rights from the time they became aware that they were being infringed. It could not be pretended that there was such delay or acquiescence as to deprive the plaintiffs of their rights. In any case it could only bear on the question of the nature and extent of the relief to be given. But I think there is nothing in this case to deprive the plaintiffs of their right to the usual judgment for an injunction. Ordinarily they would also be entitled to an enquiry as to damages or profits, at their election. But, inasmuch as it does appear from the evidence that no purchaser had been misled into buying the defendants' product instead of the plaintiffs', I think we may adopt the course taken by Romer, J., in *Hodgson* v. *Kynoch* (1898), 15 R.P.C. 465, and restrict the plaintiffs to an enquiry as to damages, if they insist upon more than nominal damages, reserving the costs of the enquiry.

The appeal should be allowed, with costs.

Appeal allowed.

R. S. C.

[IN THE COURT OF APPEAL.]

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BEAM v. BEATTY (No. 2).

Infant—Bond—Ratification.

The bond, with a penalty, of an infant to indemnify against loss or damage in respect of shares in a company purchased on the faith of representations made by the infant is void and not merely voidable, and cannot be adopted and ratified by the obligor after he has attained his majority.

Judgment of Ferguson, J., 3 O.L.R. 345, reversed.

APPEAL by the defendant from the judgment of Ferguson, J., reported 3 O.L.R. 345. The facts are stated in the report below, the neat point of law being whether an infant's bond with a penalty is void or only voidable.

The appeal was argued before OSLER, MACLENNAN, MOSS, and GARROW, JJ.A., on the 7th and 8th of May, 1902.

C. A. Masten, and *F. C. McBurney*, for the appellant. The appellant's contention is, in the first place, that the bond in question was absolutely void and incapable of ratification, and in the second place, that even if capable of ratification it has not been ratified. The transaction was an improvident one and could not under any circumstances have been for the benefit of the infant. It is clear, therefore, under the authorities, that the bond was void, the test in deciding such a question being whether any benefit to the infant can reasonably be expected to result. Here, if the shares of the company increased in value the purchaser got all the benefit, while if on the other hand the shares decreased in value the defendant became liable for all loss so that by no possibility could he obtain any advantage by the transaction. Apart from this the imposition of a penalty is, in itself, a fatal objection to the transaction. See *Baylis* v. *Dineley* (1815), 3 M. & S. 476; *The Queen* v. *Lord* (1848), 12 Q.B. 757; *Meakin* v. *Morris* (1884), 12 Q.B.D. 352; *Corn* v. *Matthews*, [1893] 1 Q.B. 310; *Green* v. *Thompson*, [1899] 2 Q.B. 1; *Edwards* v. *Carter*, [1893] A.C. 360; *Viditz* v. *O'Hagan*, [1900] 2 Ch. 87; *In re Soltykoff*, [1891] 1 Q.B. 413. The learned Judge in the Court below relies upon the

expression of opinion to the contrary in Pollock on Contracts, 5th ed., p. 59, but there is no authority to support the statement of that learned author, and it is impossible to hold that that statement is correct in face of the clear expressions of opinion to the contrary in the cases cited. [The learned counsel then dealt with the question of ratification.]

Lynch-Staunton, K.C., and *A. W. Marquis*, for the respondent. The bond in question was not void but only voidable, and there is ample evidence to support the finding of ratification. It was not an improvident transaction. The infant was enabled by giving the bond, to sell a large number of shares and to earn a commission and at the worst, if the shares turned out to be valueless, he had only to return to the plaintiff, without interest, the money he had received. This, at the least, he would have been bound to do in any event, and the bond did not increase his liability. The fact that the bond purports to be a penal obligation does not in reality affect the matter; that is a mere question of words. There is in the cases cited on behalf of the appellant at most *obiter dicta* as to the effect of the imposition of a penalty, and the modern tendency has been to hold that the deeds of an infant are not void but only voidable: Simpson on Infants, 2nd ed., p. 9; *Ayliff* v. *Archdale* (1602), Cro. Eliz. 920; *Leslie* v. *Fitzpatrick* (1877), 3 Q.B.D. 229; *Clements* v. *London and North Western R.W. Co.*, [1894] 2 Q.B. 482; *Stikeman* v. *Dawson* (1847), 1 DeG. & Sm. 90.

Masten, in reply.

September 19. The judgment of the Court was delivered by GARROW, J.A.:—This appeal depends on the proper determination of two questions, namely: 1. Whether a bond with a penalty given by an infant is void or only voidable, and 2, if voidable whether there is evidence of ratification. The learned Judge reached the conclusion that such a bond is not void but voidable, and that there was evidence of ratification.

Mr. Masten, counsel for the appellant, in an able and exhaustive argument, referred us to a number of authorities tending to establish his main proposition that such a bond is not merely voidable but wholly void, and, therefore, incapable

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of ratification, and after an examination of these and of such other cases as I could find, my opinion is that his contention is well founded.

The opposing view is based very largely apparently upon some expressions to be found in Pollock on Contracts, 5th ed., p. 59, where that learned author uses the language quoted in the learned Judge's judgment herein: "On the whole, then, we have seen that in several important classes of cases (including some that were formerly supposed exceptional) an infant's contract is certainly not void, and we have also seen that there is not any clear authority for holding that in any case it is in fact void. The opinion here maintained appears to be now generally accepted." This statement is apparently also approved by another learned author: Anson on Contracts, 9th ed., p. 113. On the other hand, it is stated as the law in Addison on Contracts, 9th ed., p. 379: "Thus, no penal obligations entered into by infants are enforceable, as it is not necessary for them, nor can it be for their benefit and advantage, to subject themselves to a penalty." While Leake on Contracts, 3rd ed., p. 466, says: "At the same time both courts of law and equity, for the protection of infants from undue influence and oppression, laid down the principle that a contract made by an infant which the Court can pronounce to be clearly to his prejudice *is absolutely void*; as a bond or any contract imposing a penalty."

No authority is cited by either Pollock or Anson for their proposition, and it is somewhat remarkable that the exact point has not apparently been before determined. It has, however, in my opinion, been so approached and surrounded, so to speak, by what I must regard as high authority, that I feel myself unable to adopt the opinions of these learned authors without, in my humble judgment, not declaring but subverting the law.

The first case to which I think it useful to refer is *Keane* v. *Boycott* (1795), 2 H. Bl. 511, where, at page 515, Eyre, C.J., states the law thus: "We have seen that some contracts of infants, even by deed, shall bind them. *Some are merely void*, namely, such as the Court can pronounce to be to their prejudice. Others, and the most

numerous class, of a more uncertain nature as to the benefit or prejudice, are voidable only, and it is in the election of the infant to affirm them or not."

Then in *Baylis* v. *Dineley*, 3 M. & S. 476, Lord Ellenborough, C.J., says: "In the case cited of the infant lessee it was equivocal in the constitution of the estate whether it was not for his benefit, a possession was given him, and a right to the estate, therefore it was equivocal whether it might not be for his benefit; and then he continues after full age, and adopts it. In the case of the infant lessor, that being a lease rendering rent, imported on the face of it a benefit to the infant, and his accepting the rent at full age was conclusive that it was for his benefit. But how do these authorities affect a case like the present, where it is clear upon the face of the instrument that it is to the prejudice of the infant, *for it is an obligation with a penalty* and for the payment of interest?"

In *Corpe* v. *Overton* (1833), 10 Bing. 252, Tindal, C.J., says: "But there is another ground on which the plaintiff is entitled to recover in this action. According to the old law, as laid down in Coke Littleton, 172a, an infant is not bound by any forfeiture annexed to a contract, *and his obligation with a penalty, even for necessaries, is absolutely void.* What is this payment, in effect, but a sum handed over by way of penalty? The principle which exempts an infant from a penalty must extend as well to a penalty enforced by handing over money in advance, as to penalties accruing on the breach of a condition." And in the same case Bosanquet, J., says: "If the payment is to be considered in the light of a forfeiture or penalty, the plaintiff is still more clearly entitled to recover it under the general law which exempts him from any such liability."

In *Leslie* v. *Fitzpatrick*, 3 Q.B.D. 229, at p. 232, Lush, J., delivering the judgment of the Divisional Court, says: "Either stipulation was of itself sufficient to invalidate it. The first was inequitable, the second violated a settled rule of law, by which an infant is incapable of contracting himself out of his secured rights, *or subjecting himself to a penalty.*"

In *Meaken* v. *Morris*, 12 Q.B.D. 352, Lord Coleridge, C.J., says: "The contention for the appellant may be tested by

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reference to the well settled rule with regard to contracts imposing penalties on infants. If the contention is correct, the stipulation for such a penalty might not invalidate the contract, for the contract as a whole might be so advantageous to the infant that the imposition of a trifling penalty would not prevent this contract from being as a whole for the benefit of the infant. But it is clear that such a contention would be inconsistent with the authorities on the subject. The law, as it stands, is, as I have always understood it, that you may not make a contract with an infant containing stipulations that cannot be for the benefit, but must be to the disadvantage of the infant, *as, for instance, a stipulation for a penalty to be paid by the infant.*"

Lord Esher, M.R., in *Corn* v. *Matthews*, [1893] 1 Q.B. 310, says: "But if we find a stipulation in the deed which is of such a kind that it makes the whole contract an unfair one then that makes the whole contract void."

Lindley, M.R., in *Viditz* v. *O'Hagan*, [1900] 2 Ch. 87, says: "Now, what is the effect of the English law as expounded by the House of Lords in *Edwards* v. *Carter*, [1893] A.C. 360? What is the theory of it? The theory is, I apprehend, this—that there are some contracts of infants which by English law *are absolutely void.* There are a few (not a great many) contracts which in the view of English law cannot possibly be for the benefit of the infant—*take a bond with penalties as an illustration*—and they are void. An infant cannot so contract. The great bulk of infants' contracts are only voidable. What does that mean? It means that when the infant comes of age he can elect either to affirm or to disaffirm his contract. If he does nothing within a reasonable time after he attains twenty-one, the presumption is that he has affirmed the contract."

In *De Francesco* v. *Barnum* (1890), 45 Ch. D. 430, Fry, L.J., uses this language: "It has been held from the time of Lord Coke, that an infant cannot bind himself to be liable to a penalty; that the contract to impose a penalty on an infant is void."

So that in these quotations extending over a period of 105 years we have a constant and, I think, clear expression of judicial opinion in favour of the proposition that the bond with a

penalty of an infant is not merely voidable but absolutely void, while not a single authority in the shape of a decided case can be found to the contrary. Lord Coleridge, in the case of *Meakin* v. *Morris*, speaks of it as a well settled rule, and Lush, J., in the earlier case of *Leslie* v. *Fitzpatrick*, uses similar language, while Lindley, M.R., as recently as the year 1900, in the case of *Viditz* v. *O'Hagan*, uses language equally explicit although somewhat differently expressed.

The rule itself may, perhaps, be expressed thus: that generally, all contracts of an infant are voidable, not void, but to this rule there are exceptions in which the contract is not merely voidable but void, and among these exceptions is the case of a bond with a penalty, and again another class of exceptions in which the contract is neither voidable nor void, but valid and binding on the infant, such as simple contracts respecting necessaries. The exception before stated in the case of bonds with a penalty may not be logical, but the question is, is it the law of the land, and after giving the matter most careful consideration I am clearly of the opinion that it is.

Having reached this conclusion I have not considered it necessary to discuss the question of ratification.

I, therefore, think the appeal should be allowed and the action dismissed, but under the circumstances without costs, and there should be no costs of the appeal.

Appeal allowed.

R. S. C.

[IN THE COURT OF APPEAL.]

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ARMSTRONG v. THE CANADA ATLANTIC RAILWAY COMPANY.

Master and Servant — Negligence — Workmen's Compensation Act — Notice of Injury — Absence of — Reasonable Excuse — Meaning of — Railway — Cause of Injury — Matter of Conjecture.

While the notice of injury required by sec. 9 of the Workmen's Compensation for Injury Act, R.S.O. 1897, ch. 160, is for the employer's protection against stale or imaginary claims, and to entitle him, while the facts are recent, to make enquiry, the injured workman is the primary object of the legislative consideration; and under such section and secs. 13 and 14, notice may be dispensed with where there is reasonable excuse for the want of it, the employer not being prejudiced.

What constitutes reasonable excuse must depend upon the circumstances of each particular case, and such may be inferred where there is the notoriety of the accident, the knowledge of the employers of the injury which resulted in death, and its cause, and of a claim having been made on them by the deceased's representative.

In an action against a railway company for alleged negligence it appeared that the deceased was killed by being run over while shunting cars. The evidence shewed that the space between two sets of tracks in the defendants' yard was dangerous by reason of an accumulation of snow and ice thereon, but there was no evidence that the tracks themselves were not in good condition, and it was merely a matter of conjecture whether, at the time of the accident, the deceased was on the tracks or on the space between them :—

Held, that under these circumstances the accident could not be said to have been due to the defendants' negligence, and the plaintiff's action failed.

Judgment of the Divisional Court, 2 O.L.R. 219, reversed.

THIS was an appeal by the defendants from the judgment of the Divisional Court, reversing the judgment of MacMahon, J., dismissing the action at the trial, and ordering a new trial between the parties, reported 2 O.L.R. 219.

On December 13th, 1901, the appeal was argued before OSLER and MACLENNAN, JJ.A., MEREDITH, C.J.C.P., and MOSS and LISTER, JJ.A.

Chrysler, K.C., for the appellants. There was no notice of the injury given within the twelve weeks after the accident, nor any reasonable excuse for dispensing therewith. Whether there is such reasonable excuse or not is a matter of fact, and it having been found on the evidence submitted, that there was no reasonable excuse for the want of notice, such finding of fact should not have been interfered with by the Divisional Court. The reasons given for the failure to give the notice

are not sufficient to constitute a reasonable excuse: *Macey* v. *Hodson* (1881), 72 L.T. Jour. 140; *Conolly* v. *Young's Paraffin Light and Mineral Oil Co. (Limited)* (1894), 22 Sess. Cas., 4th ser., 80; *McFayden* v. *Dalmellington Iron Co.* (1897), 24 Sess. Cas., 4th ser., 327; *Trail* v. *Kelman* (1887), 25 Scotch L. Reporter 8; 15 Sess. Cas., 4th ser., 4. No evidence of negligence on the part of the defendants was proved. There is nothing to shew how the accident happened, the manner in which it occurred being purely conjectural. The plaintiff sets up that the shunting yard was in a dangerous condition by reason of the accumulation of ice and snow, but this, if at all, was limited to the space between the tracks, and not to the tracks themselves, which were in good condition. There is, however, no evidence shewing whether at the time the accident happened the deceased was on the track or on the space between the tracks. The attempt to connect the defendants with the accident by reason of the statements made by the deceased after he was run over failed. These, even if admitted, did not shew any negligence on the company's part; but they were not admissible. They did not constitute part of the *res gestae*, but were mere narrative: *Regina* v. *Beddingfield* (1879), 14 Cox C.C. 341; Roscoe's Crim. Ev., 12th ed., 23; Best on Evidence, 9th ed., 435; *Vicksburg and Meridan R.W. Co.* v. *O'Brien* (1886), 119 U.S.R. 99; *Eastman* v. *Boston and Maine R.W. Co.* (1896), 165 Mass. 342; *Thompson* v. *Trevanion* (1693), Skin. 402; *Aveson* v. *Kinnaird* (1805), 6 East 188; *Rex* v. *Foster* (1834), 6 C. & P, 325.

A. E. Tripp, for the respondent. There was sufficient notice to the company of the injury. The Act does not require the notice to be in writing. Verbal notice is sufficient. The company had notice on the following morning by the report by the road master and section foreman, and, within a month, by the plaintiff herself. Even if the notice should be in writing, the company waived the necessity of giving it. Sections 9, 13 and 14 provide that the want of such notice shall not be a bar where there is a reasonable excuse for the not giving it, and the company are not prejudiced thereby. The company knew

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of the accident and dealt with the plaintiff, promising that the case would be considered, and the company have been in no way prejudiced: *Wright* v. *Bagnall* (1900), 69 L.J.N.S. Q.B. 551; *Cox* v. *Hamilton Sewer Pipe Co.* (1887), 14 O.R. 300. It must also be considered that the Act was passed for the benefit of workmen. There was evidence of negligence in the condition of the shunting yard. It was the duty of the company to have the yard in proper condition, and the evidence shewed that the yard was in a dangerous state by reason of the accumulation of ice and snow. The evidence of statements made at the time of and contemporaneous with the happening of the accident are admissible in evidence as part of the *res gestae*, having been made immediately on the accident happening: *Shaw* v. *De Salaberry Navigation Co. of Montreal* (1859), 18 U.C.R. 541; Taylor on Evidence, 9th ed., p. 376, sec. 583; *Rawson* v. *Hague* (1824), 2 Bing. 99; *Little Rock, etc., R.W. Co.* v. *Leverett* (1886), 48 Ark. 333; *Entwhistle* v. *Feighner* (1875), 60 Mo. 214; *Travellers' Ins. Co.* v. *Mosley* (1869), 8 Wall. 399; Am. & Eng. Encl. of Law (ed. 1893), vol, 21, p. 102. The admission of the evidence was discretionary with the Judge at the trial, and he having admitted it, the Court will not interfere on appeal.

September 19. The judgment of the Court was delivered by OSLER, J.A.:—The plaintiff, Nora Armstrong, in her own behalf as widow of Charles Armstrong, deceased, and as the next friend of the plaintiff, Eunice Armstrong, the only child of the deceased, seeks in this action to recover damages, under the Workmen's Compensation Act and at common law, for his death resulting from injuries received by him while in the employment of the defendants, and caused, as it is alleged, by their negligence.

The negligence alleged and relied upon, consisted in the defendants allowing a large quantity of snow to accumulate and remain for an unreasonable length of time between the tracks where the deceased was at work, and that the said snow was piled up between said tracks to a height of two or three feet, and by the changes in the weather the same became slippery and dangerous, and the deceased, whilst the train was

being shunted, slipped on the ice and snow, and, falling under the cars, was run over. And that such negligence constituted a defect within the meaning of sub-sec. 1 of sec. 3 of the Workmen's Compensation for Injuries Act, ch. 160, R.S.O. 1897. And in shunting or "kicking" cars on to a siding after being detached from the locomotive in a negligent and improper manner, and at an unusual and excessive rate of speed, and without warning to the deceased.

The defendants deny that the accident complained of was due to their negligence, or to any want of care on the part of their servants or employees; and they plead, *inter alia*, (1) contributory negligence; (2) want of notice of the accident required by sec 9 of the Workmen's Compensation for Injuries Act.

The accident happened between four and five o'clock on the morning of the 8th of January, 1899. At that time the deceased was foreman of their night shunting crew in their yards or premises in the city of Ottawa, and the work of shunting there being done was under his direction. It was the duty of the deceased to find the cars to be shunted, tell the engineer of the locomotive where to put them, to see that he properly placed them, and to assist in the work of shunting. The tracks in the yard extended in a northerly and southerly direction, and among them were two tracks or sidings, numbered respectively 4 and 5. Siding No. 5 was the easterly siding.

A few minutes before the accident five cars had been pulled out of siding No. 5 to a point about sixteen feet south of the switch used for both of these sidings. The locomotive was to the south of and attached to the cars, and the train, consisting of the locomotive and five cars, stood in that position awaiting a signal by the deceased at the switch stand to the engineer of the locomotive to back or "kick" the five cars in on siding No. 4. Because of a curve the engineer could not from his position on the locomotive see the deceased, who was supposed to be at the switch stand. A witness named Olmsted, who was standing on the footboard of the locomotive, stepped down and out towards the east, four or five feet, when he says he saw the deceased at the switch stand, which is to the east of siding No.

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5; that the deceased with his lantern gave a "kick" signal, which meant that he had arrived at the switch, and was ready to have the cars pushed or "kicked" back in on siding No. 4. He further said that the locomotive gave the cars a push or "kick," and was then moved backwards to the switch of No. 3 track; that on returning on that track four or five minutes later, he was told by one Brennan, a brakeman who was stationed on top of the cars then being shunted—but who was not called as a witness by either party—that the deceased had been run over; that he and Brennan, on going immediately to where the deceased was, found him lying on his back along the outside of the west rail of siding No. 4, at a point about twelve feet north of the switch, in the rear of the front wheels of the second car, mortally injured; that the head was towards the south, and his right arm and right leg were across the rail, crushed by the car wheels; that the first car had been derailed, and that the other four cars remained on the track; that the deceased's lantern was on the same side of the rail against which he was lying, at a point nearly opposite the switch stand: leaning against the rail and near it, were found a link and pin used for coupling cars. There is no evidence that any one saw the deceased from the moment he signalled Olmsted, until after the accident four or five minutes later. Other cars were standing on siding No. 4, and the witness Olmsted concluded that when the deceased met with his injuries he was on his way to couple those cars with the cars then being shunted in on that siding. Olmsted said that on arriving at where the deceased was, and while he was lying in the position before described, this witness asked him how the accident had happened, and the reply was, "I slipped and it hit me." One Leroy, also a witness, who was present when Olmsted asked the question, said the answer of the deceased was, "I slipped and fell." This evidence was allowed to be given under objection, as being part of the *res gestae.*

There is nothing to shew that the defendants were negligent with respect to either the condition of the space between the rails or in the manner in which the shunting was being done when the accident occurred. The evidence as to whether the "way"—that is to say, the space between the tracks—was

defective within the meaning of sec. 3 (1) of the Workmen's Compensation for Injuries Act, by reason of the defendants having allowed snow to accumulate and be piled up and become slippery so as to be dangerous, is conflicting. On this point the evidence for the plaintiffs is that the snow was piled up to a height of from a foot to sixteen inches, rounded on top and sloping towards the tracks. On the other hand, the evidence for the defendants was that "it was in good shape for working on;" that at the place and time of the accident there were not more than three or four inches of snow, and one witness said the snow was about level with the top of the rail.

The action was commenced within the time limited by the Act, but notice of the injury was not given to the defendants within twelve weeks after the happening of the accident.

The plaintiff, Nora Armstrong, testified, in substance, that about a month after the accident she had an interview with Mr. Donaldson, the general superintendent of the defendants, about her husband's death; that she explained to him her position, and asked for something from the company; that he told her he would see what the defendants could do, and that in about two weeks after he gave her a voucher for $25, saying they would bring the matter before the board and see what they could do, and that she would be notified of their decision. She was not notified of the decision which the defendants had come to, and nothing more was given to her.

At the close of the plaintiffs' evidence a motion for nonsuit, on the grounds (1) that there was no evidence of how the accident happened, (2) that notice of the injury required by sec. 9 of the Act had not been given, was refused, and on being renewed at the close of the whole of the evidence, the learned trial Judge held that no sufficient excuse had been shewn for want of notice, and gave judgment dismissing the action.

From that judgment the plaintiffs appealed to the Divisional Court, mainly on the grounds, (1) that the learned trial Judge erred in refusing to allow the case to go to the jury at the close of the defendants' evidence on the grounds that notice of action had not been given as required by the "Act to secure Compensation to Workmen," being ch. 160 R.S.O., sec. 9; (2) that the learned Judge should have dispensed with the notice of action

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on the ground that it was shewn by evidence that the defendants paid the plaintiff a small sum of money and made promises and representations that her application for damages for her husband's death would be considered, and that she would be notified of their decision, and thereby induced the plaintiffs to refrain from taking legal proceedings to recover damages under the said Act; (3) that the learned Judge should have dispensed with the said notice of action on the further ground that the defendants had in fact ample notice of the circumstances surrounding the death of the plaintiff's husband, as well by letters from her solicitor long prior to the commencement of the action, and that the defendants were not shewn to have been prejudiced in their defence, and the provisions of sub-sec. 5 of sec. 13 of the said Act should have been applied.

And the defendants cross-appealed on the grounds, (1) that the learned trial Judge erred in admitting evidence of statements made by Charles Armstrong, the deceased; (2) that no evidence of negligence on the part of the said defendants was adduced on behalf of the plaintiffs at the trial of the said action upon which the jury could properly find a verdict.

The Divisional Court ordered a new trial, holding: (1) that reasonable excuse had been given for the want of notice of the injury; (2) that the declaration of the deceased as to the cause of the accident was properly admitted as evidence; and (3) that such declaration, coupled with the evidence of the condition as to snow and ice at the place where the deceased slipped, required that both the question of whether he slipped by reason of such condition, and the question of whether such condition was due to the negligence of the defendants, should be submitted to a jury.

The defendants now appeal, and ask for a reversal of the latter judgment on grounds which I shall proceed to consider.

The first question raised is as to the failure of the plaintiffs to give the notice required by sec. 9 of the Workmen's Compensation for Injuries Act. It is contended by counsel for the defendants that the finding of the learned trial Judge that no notice that the injury had been sustained was given within twelve weeks from the occurrence of the accident causing the

death of the deceased, as required by the Workmen's Compensation for Injuries Act, sec. 9, and that no reasonable excuse for the want of such notice was offered or proved, being findings of fact, should not have been interfered with by the Court. That section is in these words: "Subject to the provisions of sections 13 and 14, an action for the recovery under this Act of compensation for an injury shall not be maintainable against the employer of the workman, unless notice that injury has been sustained is given within twelve weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or in case of death, within twelve months from the time of death; provided always that in case of death the want of such notice shall be no bar to the maintenance of such action, if the Judge shall be of opinion that there was reasonable excuse for such want of notice." Then section 13 (5) enacts as follows: "The want or insufficiency of the notice required by this section or by section 9 of this Act, shall not be a bar to the maintenance of an action for the recovery of compensation for the injury, if the Court or Judge before whom such action is tried is of opinion that there was reasonable excuse for such want or insufficiency, and that the defendant has not been thereby prejudiced in his defence."

Section 14 goes still further, enacting that if the defendant intends to rely for a defence on the grounds of want of notice or the insufficiency of notice, he shall not less than seven days before the hearing of the action, or such other time as may be fixed by rules of practice, give notice to the plaintiff of his intention to rely on that defence, and the Court may in its discretion and upon such terms and conditions as may be just, allow an adjournment of the case for the purpose of enabling such notice to be given, and in any notice given pursuant to this order shall, as to any such action, and for all purposes thereof, be held to be a notice given pursuant to and in conformity with secs. 9 and 13 of this Act.

The object of the notice is to protect the employer against stale or manufactured or imaginary claims, and to give him an opportunity while the facts are recent of making inquiry into the cause and circumstances of the accident. The several clauses which bear upon the subject are very loosely fitted

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together, but the stringency of the original provision has been much relaxed, and the injured workman is evidently the first object of the Legislature's care. See R.S.O. 1887, ch. 141, secs. 7, 10 (5); 52 Vict. ch. 23, secs. 11, 12, 13, and 55 Vict. ch. 30, secs. 9, 13 (5), 14, which is now found as R.S.O. 1897, ch. 160.

In order to justify the exercise of the power to dispense with the notice of injury, etc., prescribed by sec. 9, it should appear (1) that there was some reasonable excuse for not having given notice; and (2) that the want of it has not prejudiced the defendants in their defence.

What may constitute reasonable excuse for not giving notice is not defined, and must depend very much upon the circumstances of the particular case.

The notoriety of the accident is one element, and the employer's knowledge of it and that the workman or his representative is in fact making a claim upon him in respect of it, is another. Both these circumstances concur in the present case, and there is the additional fact that the employers took the claim into consideration but never gave the plaintiff a final answer.

Altogether, I think it might very properly have been held at the trial that there was reasonable excuse for the want of notice, and also, as the defendants had all the knowledge of the accident and claim that the most formal notice could have given them, that the want of it had not prejudiced them in their defence. I therefore agree with the judgment of the Divisional Court on this point. I cannot but think that reasonable excuse for want of notice may be very slight indeed where the occurrence of the accident appears to have been well known to the employer, and a *bonâ fide* claim for compensation therefor has been made, inasmuch as the Judge has power under section 14 in the alternative, and simply in his discretion and on such terms as he may think proper, to adjourn the trial of the action to enable notice to be given.

But though the plaintiff has surmounted this initial difficulty in her case, there remains the question whether there was any reasonable evidence for the jury that the death of the deceased was caused by the negligence of the defendants, and on that point I feel myself compelled to take a different view from that which prevailed in the Court below.

It was conceded that the space between the tracks Nos. 4 and 5 was a "way" within the meaning of the Workmen's Compensation Act, sec. 3 (1), intended for or to be used in the business of the employers, and the sole ground of negligence relied on was that its condition was defective by reason of snow and ice having been allowed to accumulate thereon so as to render it unsafe and difficult to walk upon. If the deceased was using that way and walking between the tracks, and slipped from them into track No. 5, and was then run over by the cars, it is hardly denied that there was evidence for the jury of the defective condition of the way. If, on the other hand, he was walking along No. 5 track when he was struck, the case falls to the ground, as there is no evidence of negligence in the condition of the track or the management of the engine. If deceased had reached the space between tracks 4 and 5 he must have done so by crossing in front of the cars which had just been or were just being shunted into the latter after he had set the switch; in other words, he must have passed to that place from the switch on the other side of that track. He is found just behind the front wheels of the truck of the second car, the first car having been entirely derailed. No other cause for this circumstance is suggested except that the car had passed over the deceased, and it appears to me equally consistent with all the facts in evidence that he was struck while just crossing the track in front of that car, as that he was walking along the space between the tracks and slipped into the track and under the first or second car. If the first car had not been derailed, there would be little or no room for doubt that deceased was walking between the tracks, but that fact removes the vital question whether he was walking along the track or between the tracks, into the region of conjecture. The position in which deceased's body was found cannot assist us, as the learned trial Judge observed, for the sudden collision with the car might have thrown it into any imaginable position. The Court below has assumed that the place where he slipped was between the tracks. This, however, assumes the very question in issue. Upon that theory a new trial would be right, because, as I have said, there was evidence that the place was in a slippery and dangerous condition. It would in that

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case be quite unnecessary to lay stress on the deceased's answer to the question as to how the accident happened. That was an answer to a question put some minutes after the happening of the accident, and even if it was properly admitted as being part of the *res gestae,* I do not see how it aids the plaintiff in proving where deceased was when he was struck. It is quite as consistent with one theory as with the other. He may have slipped on the track or between the tracks, but unless it points to the latter it carries the case no further.

The learned trial Judge's opinion evidently was that there was no case for the jury. And as that, after a careful examination of the evidence, is my own view, I think that the appeal should be allowed.

G. F. H.

[DIVISIONAL COURT.]

MACKAY

V.

THE COLONIAL INVESTMENT AND LOAN CO.

D. C.
1902
Sept. 5.
Sept. 19.
Oct. 6.

Jurisdiction—Writ of Summons—Service out of the Jurisdiction—Setting Aside Proceedings—Con. Rule 162.

On a motion to set aside a writ of summons the order permitting service out of the jurisdiction and the service thereunder in an action brought in this Province by shareholders resident in another Province of a loan company incorporated in and with its head office and assets consisting of real estate mortgages in the Province of Quebec, except about $1200 in mortgages on land in the Province of Ontario, against the loan company and its liquidators resident in the Province of Quebec and a loan company incorporated in the Province of Ontario and with its head office there, to set aside an agreement transferring the assets of the Quebec company to the Ontario company and making the shareholders of the former company shareholders in the latter company, and for distribution of the proceeds of the assets, etc., on the ground that the Courts in Ontario had no jurisdiction and that the case did not fall within any of the clauses of Con. Rule 162 permitting service of a writ of summons out of the Province :—

Held, that the Quebec company and its liquidator were necessary and proper parties to the action brought against the Ontario company duly served within the Province and that the case fell within Con. Rule 162, sub-sec. (*g*). Leave to plead to the jurisdiction reserved to the defendants.

THIS was a motion for an order to set aside the writ of summons, the order permitting the service of the writ out of the Province of Ontario, and the service of the same.

The motion was argued on June 14th, 1902, before the Master in Chambers.

Aylesworth, K.C., and *A. McLean Macdonell*, for the defendants, the Colonial Investment and Loan Co.

W. M. Douglas, K.C., for the Montreal Loan and Investment Co.

W. E. Middleton, and *C. D. Scott*, for the plaintiffs.

Judgment was delivered on the 5th September, 1902.

THE MASTER IN CHAMBERS :—Motion for an order setting aside the writ of summons herein, the order permitting service of same outside of Ontario, and the service of same.

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The action is brought by the plaintiffs—who reside in Nova Scotia, outside the jurisdiction of this Court—against the Colonial Investment and Loan Company, duly incorporated and having its head office in Toronto, within the jurisdiction; the Montreal Loan and Investment Company, duly incorporated, having its head office in Montreal, outside of the jurisdiction of this Court; and the liquidators of the Montreal Loan and Investment Company, who also reside in Montreal, outside of the jurisdiction of this Court.

The action is brought by the plaintiffs, who sue as well on behalf of themselves as on behalf of all other shareholders in the Montreal Loan and Investment Company, for the purpose of having set aside certain agreements and resolutions for the sale and transfer of the assets of the Montreal Loan and Investment Company, to the Colonial Investment and Loan Company on the following among other grounds: (1) That the meeting of the shareholders of the Montreal Loan and Investment Company—at which the above referred to agreements and resolutions were adopted—was not legally convened and was not a legal meeting. That the notice calling same did not give such particulars of the business proposed to be done thereat as is required by law in calling a special general meeting of the shareholders. That the plaintiffs had no proper or sufficient notice of the said meeting, or of the business proposed to be transacted thereat, and that the resolutions passed at the said meeting and the agreement entered into by the said liquidators and the Colonial Investment and Loan Company, did not agree with the statements and representations of those who convened the said meeting.

(2) That the sale and transfer of the assets of the Montreal Loan and Investment Company to the Colonial Investment and Loan Company was not advertised by public notice, as required by law.

(3) That neither the directors of the Montreal Loan and Investment Company, nor a majority of the shareholders of the said company, nor the liquidators of the said company, had power or authority to enter into the said agreements or to sell or transfer the assets of the said company to the Colonial Investment and Loan Company upon the terms and conditions contained in the said resolutions and agreements.

(4) That the resolutions and agreements for the sale of the assets of the Montreal Loan and Investment Company to the Colonial Investment and Loan Company were brought about by the manager and secretary of the Montreal Loan and Investment Company, who, as the holders of proxies from a large majority of shareholders of the said company, controlled the voting power of the said company, and who, unknown to the said shareholders of the said company, wrongfully and unlawfully received from the Colonial Investment and Loan Company monetary and other considerations to bring about the said sale.

The plaintiffs further ask for an account of the assets of the Montreal Loan and Investment Company received by the Colonial Investment and Loan Company, and for an order for the restitution of the same, with interest on the amount thereof, and for an order for the appointment of a receiver to receive and distribute the said assets.

In the alternative, the plaintiffs claim that if the agreement referred to was lawfully made, then the defendants, the liquidators of the Montreal Loan and Investment Company, should have received and distributed the proceeds of the sale of the said assets in accordance with the respective rights of the shareholders in the said company, as amongst themselves, under the by-laws of the said company, and in accordance with the provisions of the statutes of the Province of Quebec relating to the voluntary winding-up of building societies; but instead of doing so, the said liquidators permitted the Colonial Investment and Loan Company to enter into possession of all the assets of the Montreal Loan and Investment Company and to retain possession thereof; and the said liquidators wrongfully arranged with the Colonial Investment and Loan Company to issue the permanent stock of the said company to the respective shareholders of the Montreal Loan and Investment Company for an amount which, by arrangement between the said liquidators and the Colonial Company, they estimated to be the amount or share of the assets of the Montreal Company to which each shareholder was entitled, after charging to each shareholder a *pro rata* proportion of the liabilities of the said company, and without reference to the rights of the shareholders amongst themselves; that the assets and liabilities of

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the said company, and the amount to which each of the said shareholders was entitled, were not ascertained in a proper manner, and that the liabilities so charged were not liabilities of the said company for which the shareholders were liable, and were not properly chargeable to the shareholders *pro rata;* and the plaintiffs further state that the defendants, the Colonial Company and the said liquidators, have wrongfully required the plaintiffs and other shareholders of the Montreal Company to subscribe for and to agree to pay for additional shares of the stock of the Colonial Company beyond the amount of the share of the said shareholders in the assets of the Montreal Company as so found before receiving and as a condition of receiving any payment or consideration for their share in the assets of the Montreal Company, in stock or otherwise, and the said liquidators have refused to distribute the assets of the Montreal Company, and the Colonial Company have refused to carry out the said agreement unless and until the said shareholders consent to accept and pay for such additional stock in the Colonial Company, and by such means the Colonial Company have wrongfully collected from a large number of shareholders of the Montreal Company a large sum of money in payment for additional stock in the Colonial Company; and the plaintiffs claim in the alternative: (*a*) A declaration that they and other shareholders of the Montreal Company are not bound to subscribe for and to pay for additional stock in the Colonial Company, over and above the amount or share of the respective shareholders in the assets of the Montreal Company.

(*b*) A declaration or order that the Colonial Company should deliver over to the liquidators of the Montreal Company, or to a receiver appointed by this Court, the shares of stock provided by the agreement dated the 24th January, 1901, to be paid by the Colonial Company for the assets of the Montreal Company, for distribution thereof amongst the shareholders according to their legal rights.

(*c*) For a declaration that the finding or arrangements between the liquidators of the Montreal Company and the Colonial Company as to the assets and liabilities of the Montreal Company, and as to the respective shares therein of

the shareholders of the Montreal Company is not binding upon the said shareholders, and for a reference to ascertain the amount of the assets and liabilities of the said company, and of the shares or interest of the respective shareholders therein.

(*d*) For an account of the interest properly payable by the Colonial Company upon the amount of the assets of the Montreal Company transferred to the Colonial Company, and for an order for the payment of same.

(*e*) For an account of the monies received by the Colonial Company from the premium of one dollar per share upon the stock of the said company issued or proposed to be issued to the shareholders of the Montreal Company, and of the application thereof.

The motion is made on behalf of the defendants, the Colonial Company, on the grounds—

(*a*) The Ontario Courts have no jurisdiction over the subject-matter of the action, or to entertain the same, or to grant the relief claimed.

(*b*) This action ought to have been brought—if at all—in the Province of Quebec, and the Quebec Courts are the proper Courts to deal with the subject-matter of the action.

(*c*) The applicants were improperly joined with their co-defendants with the object contrary to the true meaning and intent of the rules giving the Court jurisdiction.

(*d*) There is no cause of action against the applicants.

(*e*) This action is an abuse of the process of the Court within the meaning of the rules.

The motion on behalf of the other defendants is made on the grounds: (*a*), (*b*), (*c*), (*d*), above set out; and, in addition thereto, on the grounds (2) that the applicants are not necessary or proper parties to this action as against their co-defendants; and (7) the said services were irregular or void in that they were made prior to the service of the writ of summons herein upon the defendants, the Colonial Investment and Loan Company, and that, for the same reason, the order allowing such services was void.

Counsel for the defendants contend that the subject-matter of the action being land in Quebec, that the action is improperly brought under the decisions in such cases as *The Merchants*

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Bank of Halifax v. *Gillespie, Moffat & Co.* (1884), 10 S.C.R. 312; *Henderson* v. *The Bank of Hamilton* (1894), 23 S.C.R. 716; *Burns* v. *Davidson* (1892), 21 O.R. 547; *Purdom* v. *Pavey* (1896), 26 S.C.R. 412, and similar cases.

In my opinion, this is an entirely different action from any of those referred to. This is not brought with reference to real estate in the sense that those actions were; and, therefore, the principles applied in those cases have no bearing on this application.

I refer to a late case put in by Mr. Middleton, subsequent to the argument, bearing out this view (*Duder* v. *Amsterdamsch Trustees, Kantoor*, [1902] 2 Ch. 132).

With reference to the question as to the action being properly brought, that the Montreal defendants are not necessary or proper parties to this action as against their co-defendants—in *Witted* v. *Galbraith*, [1893] 1 Q.B. 577, Lindley, L.J., in his judgment, at p. 579, said: "The rule that now applies is Order XI., *r.* 1. (*g*)," [similar to Ontario Rule 162 (1) (*g*)—which reads as follows:

"162—(1) Service out of Ontario of a writ or notice of a writ may be allowed by the Court or a Judge wherever: (*g*) A person out of Ontario is a necessary or proper party to an action properly brought against another person duly served within Ontario,"]—and it is said that the present case comes within that rule. There is a very easy method of testing whether this is true. Supposing that both the defendant firms were resident within the jurisdiction, would they both have been joined in the action?"

In the present action, applying this test, there can be no doubt as to the Montreal defendants being both necessary and proper parties to the action.

As stated by Hawkins, J., at p. 433, in the same volume and case: "The Court cannot try the case on a motion such as this, and, therefore, it cannot be necessary for the plaintiff to shew that the claim against the person within the jurisdiction is one which must ultimately succeed."

I therefore hold that the writ of summons and order allowing its service out of the jurisdiction were properly issued, and that the applications must be refused.

The costs of the motion made by the Colonial Investment and Loan Company to be costs to plaintiffs in any event.

And the costs of the motion made by the Montreal defendants to be costs in the cause, in consequence of the irregularity in serving them prior to the Colonial Investment and Loan Company with the writ of summons.

I understood that the only question with reference to the service of the writ on this ground was one of costs.

I should have stated that it appears that the Montreal defendants assigned to the Colonial Company mortgage securities on lands in Ontario to the value of one thousand two hundred and twenty-two dollars and fifty-eight cents; and this is in question in this action as an asset of the Montreal Company; and, therefore, Rule 162 (*h*) may be invoked by the plaintiffs.

From the Master's order the defendants appealed to a Judge in Chambers, and the appeal was argued on the 19th September, 1902, before Street, J.

A. McLean Macdonell, for the Colonial Investment and Loan Co.

W. M. Douglas, K.C., for the Montreal Loan and Investment Co.

C. D. Scott, for the plaintiffs.

At the close of the argument the learned Judge dismissed the appeal with costs, holding that the case came within sub-sec. (*g*) of Con. Rule 162.

On an appeal to a Divisional Court composed of Meredith, C.J.C.P., MacMahon, and Lount, JJ., on October 6th, 1902, the Court varied the orders of Street, J., and the Master in Chambers, by inserting a clause to the effect that the dismissal of the defendants' motion was to be without prejudice to their right to plead want of jurisdiction, but otherwise affirmed the order appealed from.

G. A. B.

[IN CHAMBERS.]

1902

Sept 26.

In re Turner, Turner v. Turner.

Will—Construction—Devise to Wife Subject to Condition of Making a Will in Favour of Children.

A testator devised his estate to his wife absolutely for herself, her heirs and assigns forever, in lieu of dower, but upon the express condition that she make a will providing for two of his children, "and if she should fail or neglect to make a will it is my will that instead of my estate being so divided or devised and bequeathed to her, that the same shall be equally divided share and share alike, between my two children, their heirs and assigns forever. All the residue of my estate not hereinbefore disposed of I give and devise and bequeath unto my said wife":—

Held, that under the above devise, the widow, who had complied with the condition by making a will in favour of the two children, took an estate in fee simple in lands forming part of the said residuary estate, but that she could not revoke the will, and that the judgment should so declare.

This was a motion for the construction of the will of Robert James Turner, deceased, dated June 15th, 1895, in which, after making a specific devise of certain lands to his son, he proceeded :—

"Subject to the foregoing I give, devise and bequeath all the real and personal estate as aforesaid that I may die possessed of to my wife absolutely for herself, her heirs and assigns forever in lieu of all dower subject further and provided that she shall pay or cause to be paid the mortgage encumbrance to McTaggart now registered against the lands hereinbefore devised to my son George Alfred Turner, provided always and this devise and bequest is made upon the express condition to my said wife, that she does and shall make a will of her said estate providing for my other two children, and if she should fail or neglect to make a will it is my will that instead of my said estate being so devised and bequeathed to her that the same shall be equally divided share and share alike between my two other children, James Wilson Turner and and Anna Mabel Turner, their heirs and assigns forever. All the residue of my estate not hereinbefore disposed of I give, devise and bequeath to my said wife."

The estate thus devised and bequeathed to the testator's wife consisted in part of certain lands.

The devisee had made a will in favour of the two children above mentioned, which was in existence unrevoked at the time of this motion.

The motion was argued on September 26th, 1902, before BOYD, C., in Chambers.

W. Proudfoot, K.C., for the executor and a devisee, contended that the widow was entitled to a fee simple under the above devise, and not merely to a life estate: *Bank of Montreal* v. *Bower* (1889), 17 O.R. 548, 18 O.R. 226, and cases there cited; *In re Jones, Richards* v. *Jones*, [1898] 1 Ch. 438; *Robinson* v. *Ommanney* (1882-3), 21 Ch. D. 780, 23 Ch. D. 285; that the condition attached was unenforceable: Theobald on Wills, 5th ed., p. 436.

F. W. Harcourt, for the official guardian, contended that the wife only took a life estate, and that the estate then went to the children: *Godfrey* v. *Godfrey* (1863), 11 W.R. 554; *In re Haly's Trusts* (1889), 23 L.R. Ir. 130; Theobald on Wills, 5th ed, p. 436.

BOYD, C.:—The widow takes a fee simple, having complied with the condition as to making a will in favour of the children, but would have no power to revoke the will; and the judgment should contain a declaration that the will is irrevocable.

A. H. F. L.

[IN CHAMBERS.]

1902

Sept. 22.

IN RE YATES.

Interest—Will—Legacy—Statute of Limitations.

An administrator with the will annexed, who was also a legatee of monies charged on land, payable six months after the death of the testator, did not sell the land to pay herself the legacy, but held it for some eight years till it could be sold more advantageously:—

Held, that the hand to pay and the hand to receive being one and the same, the Statute of Limitations had no application, and the claim for the legacy was a still subsisting claim, with interest as accessory for the period till the fund was in hand for payment.

THIS was a motion made under Rule 938 on behalf of an infant child of a deceased devisee under a will for an order determining whether a legacy, charged on the lands devised, should be paid with interest from the death of the testator, or with only six years' interest.

The motion was argued on September 22nd, 1902, before BOYD, C., in Chambers.

J. Hoskin, K.C., for the infant applicant.

D. W. Saunders, for the legatee, claimed interest from the death, contending that the Statute of Limitations, R.S.O. 1897, ch. 133, sec. 17, did not apply to the case of an executor or trustee who is also a legatee: *Binns* v. *Nichols* (1866), L.R. 2 Eq. 256; *Seagram* v. *Knight* (1867), L.R. 2 Ch. 628; *In re Dixon, Heynes* v. *Dixon*, [1899] 2 Ch. 561; and that the executor would have had a right to pay a statute-barred debt, and had in this case the right to retain such a debt when payable to himself: *Stahlschmidt* v. *Lett* (1853), 1 Sm. & G. 415; *Budgett* v. *Budgett*, [1895] 1 Ch. 202, 215; *Hill* v. *Walker* (1858), 4 K. & J. 166.

September 22. BOYD, C.:—The testator died on November 8th, 1892. By his will, $300 was charged on some land devised to his daughter Harriet, to be paid to his daughter Maria six months after his death. The daughter Harriet was made executrix of the will, but she predeceased him, having died May 1st, 1892. Thereupon letters of administration, with

the will annexed, were granted to the other daughter, the legatee, on December 12th, 1892. This daughter did not sell the estate to pay herself the legacy charged on the land, but held it till it could be sold advantageously at a greatly advanced price, to the benefit of all parties.

The question is whether the legacy should be paid with interest from the date of six months after the death to the present time, some eight years. The point appears to be covered by authority that where the hand to pay and the hand to receive are one and the same, the Statute of Limitations has no application. The claim for the $300 subsists, and therewith interest as an accessory for the period till the fund is in hand for payment: *Binns* v. *Nichols*, L.R. 2 Eq. 256; *Seagram* v. *Knight*, L.R. 2 Ch. 628.

A. H. F. L.

[BOYD, C.]

1902

Sept. 26.

IN RE ALLEN AND TOWN OF NAPANEE.

Municipal Corporations—Powers—Trimming Trees on Street—Resolution—Necessity for By-law—Municipal Act, R.S.O. 1897, ch. 223, sec. 574, sub-sec. (4)—Ib., ch. 243, sec. 2.

A town council passed a resolution that "the street committee have instructions to see that the street trees, where necessary, be properly trimmed:"—*Held*, that under sec. 574, sub-sec. (4) of the Municipal Act, R.S.O. 1897, ch. 223, municipal corporations have power to deal with the trimming of all trees the branches of which extend over the streets of the municipality, but that it is a matter which should be dealt with not by resolution, but by by-law, as indicated by sec. 575 of the Act.

THIS was a motion for an order to quash a resolution of the town council of the town of Napanee to the effect, that "the street committee have instructions to see that the street trees, where necessary, be properly trimmed." The Municipal Act, R.S.O. 1897, ch. 223, sec. 574, sub-sec. (4), gives power to the council of "cities, towns and villages having a population of 40,000 or more," to pass by-laws authorizing the planting of trees on the streets of the municipality, and the trimming of all trees, the branches of which extend over the streets thereof.

The motion was made before BOYD, C., on September 25th, 1902, in Weekly Court.

C. R. W. Biggar, K.C., for the applicant, pointed out that the above section was taken from 60 Vict. ch. 45, sec. 12 (O.), passed in consequence of the decision in *Hodgins* v. *The City of Toronto* (1892), 19 A.R. 537, and was expressly limited to cities, and that the statute commissioners inadvertently inserted the additional words, "towns and villages," which made nonsense of the section, as there were no towns or villages of 40,000 inhabitants; that the Legislature clearly intended to give a general power of trimming trees on the street only to municipalities with so large a population that they could and would employ a competent person; that the Ontario Tree Planting Act, R.S.O. 1897, ch. 243, sec. 2 (4) made the trees on either side of a highway the property of the owner of the land adjacent to the highway, and therefore the resolution was an

improper interference with private property; that it would no doubt be different if branches of a tree obstructed a highway in such a manner as to be a nuisance: Biggar's Municipal Act, p. 705; but that it was clear here that the trimming was far in excess of that needed to prevent obstruction of the highway; that at any rate the town had no right to act by resolution but only by by-law: R.S.O. 1897, ch. 223, secs. 325, 574, sub-sec. 4, sec. 575.

W. E. Middleton, for the town of Napanee, contended that every municipality has an inherent right to deal with trees growing on the highway so as to make them passable: *Turner* v. *Ringwood Highway Board* (1870), L.R. 9 Eq. 418; *Hodgins* v. *City of Toronto*, 19 A.R. 537; that it is an implication from their general power to keep the streets in repair that municipalities have power to trim such trees; that cutting a branch off a tree is not a corporate act requiring a by-law any more than sending out scavengers to clean the streets.

September 26. BOYD, C.:—Section 574 of the Municipal Act, R.S.O. 1897, ch. 223, is not happily framed in the Revision. It is made up from a collection of various enactments, but with the incongruous result that sub-sec. 4, relating to the planting and trimming of trees, on or adjacent to streets, purports to confer jurisdiction to pass by-laws thereupon on the councils of cities, towns and villages, having a population of 40,000 or more. Of course there are no towns and villages in Ontario with such a population. Yet sec. 575 contemplates that by-laws for cutting and trimming and removal of such trees on streets may be passed by towns and villages. As to the case in hand, Napanee is a town of some 3,200 inhabitants, and the council has passed a resolution that the street committee have instructions to see that the street trees where necessary be properly trimmed. I incline to think that the proper construction of sec. 574 (4), is that towns and villages may pass by-laws authorizing some officer, appointed for that purpose by the council, to trim all trees, whether on or adjacent to the streets whereof the branches extend over the streets. That is to say, power is conferred upon the municipality to provide that these trees do not by their growth and

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extension of branches "obstruct the fair and reasonable use of the thoroughfare." These quoted words are from the Tree Planting Act, R.S.O. 1897, ch. 243, sec. 2 (1), and are there applied to the tree itself as first planted, and the section in hand may be fairly read as supplemental to that, so as to provide for the case of a tree rightly planted, and by growth no obstruction as a whole and yet becoming objectionable by its sweep and droop of branch.

Taking it then that jurisdiction exists, yet it seems clear that the power of general supervision here claimed must be exercised not by resolution but by by-law. The power to interfere is conferred by the Municipal Act, and it is to be brought into operation as that Act provides by sec. 325. Indeed, sec. 575 expressly indicates that trimming is to be done under the provisions of a by-law. I refer to *Waterous Engine Works Co.* v. *The Corporation of the Town of Palmerston,* in all its stages (1891-2), 20 O.R. 411, 19 A.R. 47, 21 S.C.R. 556.

On the ground of informality I have to quash the resolution, but, as I favour its validity in point of merits, without costs.

A. H. F. L.

[DIVISIONAL COURT.]

IN RE THOMSON V. STONE.

1902
Nov. 3.

County Court—Jurisdiction—Equitable Relief—Setting aside Chattel Mortgage.

AN appeal by the defendants from the judgment of Meredith, C.J.C.P., reported *ante* p. 333, refusing an order for prohibition, was argued before a Divisional Court [FALCONBRIDGE, C.J.K.B., and STREET, J.] on the 3rd of November, 1902, and at the conclusion of the argument was dismissed with costs.

John MacGregor, for the defendants.

B. E. Swayzie, for the plaintiff.

R. S. C.

[BRITTON, J.]

ELLIOTT V. HAMILTON.

1902
Oct. 30.

Bankruptcy and Insolvency—Assignments and Preferences—Judgment—Execution—Sheriff—Sale of Land.

Under a writ of *fieri facias* a sheriff seized the interest of a judgment debtor in certain lands and advertised the interest for sale. Three days prior to the time fixed for the sale the judgment debtor made an assignment for the benefit of his creditors pursuant to the provisions of R.S.O. 1897, ch. 147. The assignee gave notice to the sheriff of the assignment and asked for a statement of the costs incurred to that time. No tender of the costs was made or undertaking given to pay them, and the sheriff proceeded with the sale and sold the land to the plaintiff. The assignee, notwithstanding the sheriff's sale, assumed to sell the land to, and executed a conveyance in favour of, the defendant's son, who allowed the defendant to remain in possession as his agent :—

Held, that the assignment for the benefit of creditors did not stand in the way of the sheriff proceeding to sell under the writ of execution, and that the sale by the assignee was nugatory and void, and the sheriff's vendee entitled to possession of the land.

ACTION of ejectment for the recovery of possession of the east half of lot 8 in the 7th concession of the township of Tay, in the county of Simcoe, tried at Barrie in October, 1902, before BRITTON, J. The facts are stated in the judgment.

D. B. Simpson, K.C., for the plaintiff.

R. D. Gunn, for the defendant.

Britton, J.

1902

ELLIOTT v. HAMILTON.

October 30. BRITTON, J.:—On the 5th of January, 1878, the plaintiff recovered judgment against the defendant, who was the owner of the land in question, for the sum of $1,567.80 debt, and $22.75 taxed costs. On the 8th of December, 1896, an order was made granting the plaintiff leave to issue execution upon this judgment. On the 19th of December, 1896, a writ of *fieri facias* was issued against the goods and lands of the defendant, which writ was placed in the hands of the sheriff of the county of Simcoe. The sheriff subsequently made a return of *nulla bona* to that part of the writ requiring him to make the money out of the goods of the defendant, and he seized and duly advertised for sale the interest of the defendant in the land above mentioned, such sale to take place on the 27th of February, 1899.

On the 24th of February, 1899, the defendant made an assignment for the benefit of creditors, under R.S.O. 1897, ch. 147, to one George H. Clarke. On the day of sale, and before the actual sale, the sheriff received a letter from the defendant's solicitor, who then was acting for the assignee, notifying him (the sheriff) of this assignment and asking him to send a memo. of costs to the assignee. There was no tender of the amount of the costs, no deposit of money, and no undertaking on the part of the solicitor that the costs would be paid. The plaintiff's solicitor was present, and the sheriff informed him of the contents of this letter. As costs had been incurred the sheriff was advised that he had the right to go on and sell, and he sold pursuant to notice. The plaintiff became the purchaser, and a deed to the plaintiff was executed by the sheriff in due course.

The assignee, notwithstanding the sheriff's sale, assumed the right to sell, and did sell and execute a conveyance to one William Hamilton (a son of the defendant), of this same land.

The defendant contends that under R.S.O. 1897, ch. 147, sec. 9, the sheriff had no right to sell after notice of assignment, and that the plaintiff took nothing by his deed. It is admitted that the defendant James Hamilton is still in possession, and that he is there only as the agent of William Hamilton, and claims as such.

Gillard v. *Milligan* (1897), 28 O.R. 645, governs this case, and I am bound by it. Sections 4 and 9 of R.S.O. 1887, ch. 124, are the same as sections 5 and 11 of R.S.O. 1897, ch. 147. The words of Armour, C.J., in the case cited, after reciting the judgment, assignment, etc., are: "The assignment, therefore, did not stand in the way of the sheriff proceeding to seize and sell under the execution the property assigned for these costs."

Ryan v. *Clarkson* (1889), 16 A.R. 311, (1890), 17 S.C. 251, decides that the costs are costs not of the execution only but all the usual costs which could be recovered from the debtor under an execution.

It is not material for the decision, but apparently the assignment and the sale by the assignee to William Hamilton were made to get priority over plaintiff. The real claimant, William Hamilton, had notice of the sale by the sheriff before he paid the purchase money, $125, to the assignee.

The assignee commenced a suit attacking the sheriff's sale and conveyance, but this action was discontinued. Under the circumstances there is less hardship upon William Hamilton in the loss of this land than there would have been had he been a purchaser without notice.

Judgment for the plaintiff for recovery of possession with costs.

R. S. C.

[IN THE COURT OF APPEAL.]

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RITCHIE v. VERMILLION MINING COMPANY.

Company—Mining Company—Purchase and Sale of Land—Irregularities in Proceedings—Directors—Qualification—Shares Held in Trust—Improper Proceedings to Bring Mining Lands to Sale.

A mining company subject to the provisions of the Ontario Companies Act, R.S.O. 1897, ch. 191, and the Ontario Mining Companies Incorporation Act, R.S.O. 1897, ch. 197, has power to buy and sell land, and a sale in good faith of all the land owned at the time by the company is not necessarily invalid, there being nothing to prevent the business of the company being continued by the purchase of other land.

Nor can such a sale made in good faith be restrained at the instance of a dissentient minority of shareholders on the ground that irregularities have occurred in the conduct of the proceedings of the company leading up to the sale, or on the ground that the approving majority are also shareholders in a rival company and are, in carrying out the sale, furthering the interests of that rival company.

Judgment of Street, J., 1 O.L.R. 654, affirmed.

But any sale of mining properties such as those in question should only be held at such season of the year and under such circumstances as would afford intending purchasers the amplest opportunity for inspecting and testing the products of the mines:—

Held, therefore, that the plaintiffs were entitled to an injunction against the sale by auction which the defendants were intending to hold when the action was commenced.

Quære, whether, under the Ontario Companies Act, a person holding shares in trust is qualified to act as director?

AN appeal by the plaintiffs from the judgment of Street, J., reported 1 O.L.R. 654, was argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 8th, 9th, and 10th of May, 1901.

The plaintiffs were shareholders in the defendant company, and brought the action on behalf of themselves and all the other shareholders in the company, except the individual defendants who held a majority of the shares in, and were the *de facto* directors of, the company, to restrain a threatened sale by the defendant company of all its real estate. The facts are stated in detail in the report below and in the judgments in this Court.

Aylesworth, K.C., and *N. F. Davidson*, for the appellants. The appellants submit that neither the directors of the company nor the majority of the shareholders have any right to sell the whole of the real estate of the company against the protest of a single dissentient shareholder. An alienation of

the company's real estate could only be made legally in the ordinary course of conducting its corporate business or operations, and what is here threatened and intended is the bringing to an end of the business. Such a step is illegal: Brice on Ultra Vires, 3rd ed., pp. 47, 110, 113; Cook on Corporations, 4th ed., sec. 670; Thompson on Corporations, sec. 3983; Lindley on Companies, 5th ed., p. 579; 7 Am. and Eng. Encyc., 2nd ed., p. 734; *Bird* v. *Bird's Patent Deodorizing Co.* (1874), L.R. 9 Ch. 358; *Simpson* v. *Westminster Palace Hotel Co.* (1860), 8 H.L.C. 712; *In re Sovereign Life Assurance Co.* (1889), 42 Ch. D. 540; *Fetherstonhaugh* v. *Lee Moor Porcelain Clay Co.* (1865), L.R. 1 Eq. 318. The case of *Wilson* v. *Miers* (1861), 10 C.B.N.S. 348, relied on in the judgment below, decides only that in the special circumstances of that case a valid contract existed between the directors and the purchasers, but it is not decided there that a shareholder could not have interfered to stop the sale. See Brice on Ultra Vires, 3rd ed., p. 47, where *Wilson* v. *Miers* is contrasted with *Gregory* v. *Patchett* (1864), 33 Beav. 595. The powers given to directors of a company by the Ontario Companies Act must be read in the light of the general scope, object and purposes of the company, and only justify the making of contracts in carrying on the ordinary business of the company: *Whiting* v. *Hovey* (1886), 13 A.R. 7, at pp. 33, 35. The evidence in this case shews that the rights of the minority are being absolutely disregarded, and the contemplated sale is being made not for the general benefit of the shareholders, but for the benefit of the defendant shareholders who are interested in a rival company, and that the defendant shareholders are taking this means to do away with competition which might be detrimental to the profits of that rival company. The proposed sale is not being fairly conducted, or proper steps being taken to obtain the full value of the property. The proposed course, therefore, will in effect be a fraud on the minority, and the Court has also on that ground jurisdiction to interfere: Lindley on Companies, 5th ed., p. 579. Apart from this, there are irregularities in the proceedings which justify the interposition of the Court, for the procedure directed by the Act has not been followed. The defendants assume to act as directors, but have not been legally

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elected, and are not even qualified to be elected as directors. The only shares which several of the defendants hold are held by them as trustees, and shares held in that way are not a sufficient qualification in this Province, where absolute ownership is essential. In *Pulbrook* v. *Richmond Consolidated Mining Co.* (1878), 9 Ch. D. 610, it was decided that shareholders who are registered as such are qualified to act as directors, although they hold in trust for other parties, but the only qualification required under the English Act is being a registered shareholder, and the fact of trusteeship is perhaps immaterial, though even in England this is doubtful: see *Cooper* v. *Griffin*, [1892] 1 Q.B. 740; *Howard* v. *Sadler*, [1893] 1 Q.B. 1. Then proper notice of the meeting at which the sale was decided upon was not given. These irregularities are not mere matters of internal management which can be waived; they directly affect the implied contract between the company and each individual shareholder that all statutory provisions shall be duly and fully observed: Lindley on Companies, 5th ed., p. 305; *Waddell* v. *Ontario Canning Co.* (1889), 18 O.R. 41.

Wallace Nesbitt, K.C., *Riddell*, K.C., and *Robert McKay*, for the respondents. The defendant company is subject to the provisions of the Ontario Companies Act, R.S.O. 1897, ch. 191, and sub-sec. (*g*) of sec. 25 of that Act gives express power to acquire and sell real estate, and provides, moreover, that no parcel of land not required for the actual use and occupation of the company shall be held for a longer period than seven years. The same power and the same provision are expressly incorporated in the charter of the defendant company. The company is also subject to the provisions of the Ontario Mining Companies Incorporation Act, R.S.O. 1897, ch. 197, and sub-sec. (*b*) of sec. 4 of that Act also gives power to acquire and sell land. The position of this company, therefore, is the same as the position of a company under the Imperial Joint Stock Companies Acts, with powers in its articles of association to sell and dispose of all its real property, and in such a case the law is clear that in the exercise of this power to sell, it thus being one of the incidental powers of the company, the wishes of the majority of the shareholders must govern: Palmer's Company

Law, p. 44; *Cotton* v. *Imperial, etc., Investment Corporation*, [8923] Ch. 454; *Wilson* v. *Miers*, 10 C.B.N.S. 348; *New Zealand Gold Extraction Co.* v. *Peacock*, [1894] 1 Q.B. 622; and the same result has been arrived at under our own Acts: *Hovey* v. *Whiting* (1887), 14 S.C.R. 515, which establishes that in a case such as this the sale of the lands of the company, being within its express powers, might be made by the directors without the assent of the shareholders, though there is in fact in this case almost unanimity among the shareholders as to the advisability of selling. The authorities referred to on behalf of the appellants' proposition that the directors or a majority of the shareholders have no power to sell are inapplicable, for these are either cases where, by the articles of association, the company in question had no power to sell, or where the company had been incorporated for some specific object, and the attempted sale would have in effect put an end to the business of the company. The defendant company was not incorporated for the purpose of mining in or using any specific land; it has power to carry on mining operations within the district of Algoma, and the sale of the property now in question by no means puts an end to its existence. On the contrary, the shareholders may decide to acquire other property of a more satisfactory character and to carry on mining operations thereon. It is submitted that the right to sell exists, and the majority of the shareholders being in favour of the sale, the Court cannot interfere on any ground of irregularity, and fraud has been expressly negatived by the learned Judge. The sale, too, is being openly and fairly conducted. See Lindley on Companies, 5th ed., p. 314; *Foss* v. *Harbottle* (1843), 2 Ha. 461, at p. 495; *Lord* v. *Copper Miners' Co.* (1848), 18 L.J. Ch. 65, where it is laid down that if the act is capable of ratification the Court will not interfere. The same principle is recognized in *Browne* v. *La Trinidad* (1887), 37 Ch. D. 1; *Purdom* v. *Ontario Loan and Debenture Co.* (1892), 22 O.R. 597; *Allen* v. *Ontario and Rainy River R.W. Co.* (1898), 29 O.R. 510; *Macdougall* v. *Gardiner* (1875), 1 Ch. D. 13. There is nothing in the objections as to the qualification and status of the directors. Even assuming that the directors had not been elected at properly called meetings, they

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would still, having regard to the express provisions of sec. 4 of R.S.O. 1897, ch. 191, be *de facto* directors of the company. The argument of the appellants really is that a director by being re-elected at an informal meeting forfeits his existing right to the office. The omission, if omission there were, to give the notice of the meeting as prescribed by the by-laws is not of any real importance, for a majority of the shareholders of the company did in fact attend the meeting. The directors do in fact hold a sufficient number of shares in their own right to qualify them for that office, but even if they did not the objection cannot prevail. The point is clearly determined under the English Act, which is not distinguishable on this point from our own. The defendants are admittedly acting as directors, and it is only the company who would have the right to complain of their so doing; an individual shareholder or a minority of the shareholders cannot complain. Here the company joins in the most unequivocal way in denying the right of the plaintiffs to interfere. The possible action of the Government is another element in the case which is of importance.

Aylesworth, in reply.

September 19. MACLENNAN, J.A.:—The first question in this appeal is whether the company had power to make the sale sought to be restrained. The company was incorporated under the Ontario Joint Stock Companies Act, R.S.O. 1887, ch. 157, by letters patent dated the 21st of February, 1888. The purposes of the company are declared to be the carrying on of mining operations, and all other work in connection therewith, in the District of Algoma. The patent recites that fifty per cent. of the capital already subscribed, namely $206,000, had been paid in by the transfer of property, and provides for forfeiture, at the option of the Government, of lands held by the company, or any trustee on its behalf, longer than seven years, without being disposed of. The land so liable to forfeiture is defined to be land at any time acquired by the company, and not required for its actual use and occupation, or not held by way of security, or not situate within the limits, or within one mile of the limits, of any city or town in the said Province.

Besides R.S.O. 1887, ch. 157, the company was subject to the provisions of the Companies' Clauses Act, R.S.O. 1887, ch. 156, as enacted by section 4 of that Act. The provisions of these two Acts were recast, and, since 1897, the company is regulated by the Ontario Companies Act, R.S.O. 1897, ch. 191, by section 5 whereof the provisions of sections 17 to 105 inclusive are made applicable to this company. The company is also subject to the Ontario Mining Companies Incorporation Act, R.S.O. 1897, ch. 197, by section 2 of which all mining companies, whether theretofore or thereafter incorporated under any general Act, were made subject thereto.

By section 25 (*g*) of ch. 191, the company had power to acquire any real estate necessary for the carrying on of its undertaking, and to hold, use, sell, alienate and convey the same. The section which confers this power is followed by a proviso for forfeiture of the company's lands if held for a longer period than seven years, in the same terms as the proviso in the company's charter. I cannot help thinking that the provision for the forfeiture of land not situate within the limits, or within one mile of the limits, of any city or town in the Province, is a mistake, both of the Government in preparing this charter and of the Legislature in passing the Act. It is not suggested that this land is within the limits, or within one mile of the limits, of any city or town, nor in general are mining lands likely to be situate within such limits or distance. No point, however, was made of this upon the argument, and the proceedings for forfeiture taken by the Government were taken under another clause of the charter, which authorizes a forfeiture thereof by the Government for non-user during three consecutive years, or if the company should not go into actual operation within three years.

The Mining Companies Act also contains a section enabling such companies to acquire land. By section 4 of that Act a mining company shall, if the letters patent permit, have power for its mining, milling, reduction, and development operations only: "(*b*) To acquire by purchase . . . mines, mining lands . . . or any interest therein . . . and to lease, mortgage, sell, dispose of, and otherwise deal with the same or any part thereof, or any interest therein."

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The Companies Act restricts the power of a company to acquire lands to what is necessary for the carrying on of its undertaking; and the Mining Act confines it to what is necessary for the company's mining, milling, reduction, and development operations. And in neither case is there any express qualification of the power of alienation.

I am unable to see that any restriction upon the express power of alienation can be implied. The company is not limited to the purchase for their purposes of any particular parcel or parcels of land, except perhaps they are confined to the District of Algoma. They might buy land for a mine and find it unsuitable, or not so suitable as other land; why should they not have the same liberty as a private person to act from time to time, as they deem to be for their interest, and to sell and buy as their interest seemed to require? It is said that the sale of this land is a sale of the company's business, and so is *ultra vires*. I do not think so. There is nothing to prevent the business being continued by the purchase of other mines or mining lands afterwards; and it is for the company to determine what shall be done afterwards. *Wilson* v. *Miers*, 10 C.B.N.S. 348, cited in the judgment, appears to me to be a distinct and satisfactory authority on this point, and a case which I have not found doubted anywhere. I also refer to *Whiting* v. *Hovey*, 13 A.R. 7, 14 S.C.R. 515.

The next ground taken by the appellants is that a sale would be injurious to the plaintiffs. The answer to that is that the affairs of a company must be managed according to the judgment of the majority of shares, by which the directors, the executive body, are elected; and so long as what is done is legal, it cannot be prevented or undone merely because it may be disadvantageous to a minority of the members. It is said that the defendants, who control 2,382 shares out of a total number of 2,400, are selling this property not so much in the interest of the defendant company as in the interest of the Canada Copper Company, another mining company operating in the neighbourhood of the defendant company's lands, in which they are large shareholders; and not only so, but that their action is or will be ruinous to the defendant company. That may even be so, and yet if the company has the legal

power to make this sale, as I think it has, the plaintiffs are without remedy. In *Pender* v. *Lushington* (1877), 6 Ch. D. 70, at p. 75, Jessel, M.R., said: "In all cases of this kind, where men exercise their rights of property, they exercise their rights from some motive, adequate or inadequate; and I have always considered the law to be that those who have the rights of property are entitled to exercise them whatever their motives may be for such exercise." And further on he says: "I am confirmed in that view by the case of *Menier* v. *Hooper's Telegraph Works* (1874), L.R. 9 Ch. 350, 354, where Lord Justice Mellish observes: 'I am of opinion that although it may be quite true that the shareholders of a company may vote as they please, and for the purpose of their own interests, yet that the majority of shareholders cannot sell the assets of the company and keep the consideration.' In other words, he admits that a man may be actuated in giving his vote by interests entirely adverse to the interests of the company as a whole. He may think it more for his particular interest that a certain course may be taken, which may be in the opinion of others very adverse to the interests of the company as a whole, but he cannot be restrained from giving his vote in what way he pleases, because he is influenced by that motive. There is, if I may say so, no obligation on a shareholder of a company to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right if he thinks fit to give his vote from motives or promptings of what he considers his own interest." The Master of the Rolls adds: "This being so, the arguments which have been addressed to me, as to whether or not the object for which the votes were given would bring about the ruin of the company, or whether or not the motive was an improper one which induced these gentlemen to give their votes, or whether or not their conduct shews a want of appreciation of the principles on which the company was founded, appear to me to be wholly irrelevant." I refer also to *North West Transportation Co.* v *Beatty* (1887), 12 App. Cas. 589.

The plaintiffs' grievance is that the defendants, other than the company, are all shareholders in a rival company, and have acquired all the shares of the defendant company except

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eighteen for the express purpose of preventing the defendant company from opening up its mines and carrying on its business. I think there is very strong evidence that such was the motive of the defendants in acquiring the stock. That seems to have been done as long ago as 1890, and although a good deal had previously been done by the former shareholders in developing the property by sinking shafts and extracting ores, nothing whatever has been done since. There is also some evidence that one motive of some of the defendants in taking proceedings for a sale of the property is to get rid of the plaintiffs. But I do not think these charges, if proved, would entitle the plaintiffs to maintain this action if the company has power to sell its property. It is clear that the Court could not compel the company, or its directors, to proceed with the development of the property or to work its mines; and if it chose to suspend for a long time, or even to abandon all mining operations, the Court could afford the plaintiffs no assistance, and the motives of such conduct would be immaterial. It appears, also, that the shares were ultimately paid for with the money of the rival company, and have been since the commencement of this action divided ratably among the shareholders of the other company.

It was further contended that the proceedings by which the sale was authorized were irregular and void, and that the company was not bound by them; that the meetings of the shareholders and directors respectively were not properly called; and that the directors were not only not duly elected, but that they were not legally qualified.

But whether the meetings of shareholders were regularly called or not, there is no doubt that only a small fraction of the shares were unrepresented at any of them. And at the meeting of shareholders on the 16th of July, 1897, by which the sale of the property was authorized, 2,296 shares were represented, of which 2,289 voted in favour of the sale, and only seven against it.

The same observation may be made as to the annual election of directors. Whatever irregularity or want of qualification there may have been, everything that was done by the directors was approved of by the vast majority of the shares.

With regard to the objection to the qualification of the directors, which is that they held their shares as trustees for the rival company, and not absolutely in their own right, as required by section 42 of the Companies Act, I think it by no means clear that the shares were held in trust. There was no express trust, and the seven shares excepted from the resolution of the 26th of August, 1890, were intended as a qualification of the directors, and may have been a transfer to them in advance of the ultimate distribution of the shares among the shareholders of the other company. If the shares held by the directors, or any of them, were actually held in trust, and not beneficially, I do not think, having regard to the discussion of the subject in the three English cases—*Pulbrook* v. *Richmond Consolidated Mining Co.*, 9 Ch. D. 610; *Cooper* v. *Griffin*, [1892] 1 Q.B. 740; and *Howard* v. *Sadler*, [1893] 1 Q.B. 1—we could hold them qualified. The language of our Act is much stronger than that of the English Act by reason of the use of the word *absolutely*, and I think we ought to hold it to mean a beneficial holding. That difficulty, however, was got over shortly after the commencement of this action by the transfer to each of the defendants of a considerable number of shares beneficially.

But I am of opinion that the company having power to do what is sought to be restrained, the plaintiffs cannot succeed on any ground of mere irregularity. The company is made a defendant, and is here on the face of the record ratifying and confirming what has been done, and insisting upon what has been begun being proceeded with.

I think the appeal must be dismissed.

MOSS, J.A.:—The Vermillion Mining Company, of Ontario, Limited, was duly incorporated by letters patent issued by the Lieutenant-Governor of this Province on the 21st of February, 1888, under the authority of R.S.O. 1887, ch. 157. The purposes and objects expressed by the letters patent were the carrying on of mining operations and all other work in connection therewith in the District of Algoma, and by the said letters patent the applicants for incorporation were created a body corporate and politic, capable forthwith of

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exercising all the functions of an incorporated company for the purposes and objects aforesaid. The letters patent further directed that the company should be subject to the provisions of R.S.O. 1887, ch. 157, and to such further and other provisions as the Legislature of Ontario might thereafter deem expedient in order to secure the due management of its affairs and the protection of its shareholders and creditors. By section 16 of ch. 157, every company incorporated under its provisions was authorized to acquire, hold, alienate and convey real estate, subject to any restrictions or conditions in the letters patent set forth. The only restrictions or conditions imposed upon this company by the letters patent were the limitation to seven years after acquisition of the holding of any parcels of land or interest therein not required for its actual use or occupation, or not held by way of security, or not situate within the limits, or within one mile of the limits, of any city or town in the Province.

Upon its incorporation, the company became possessed of 1872 acres of land in the 4th concession of the township of Denison, and 564 acres in the 3rd and 4th concessions of the township of Graham, in the District of Algoma, through the transfer thereof by the applicants for the letters patent as payment on account of their subscribed shares in the company. No special mention is made of these lands in the letters patent, and the only reference that may be taken as applying to them is the statement that in the case of each of the applicants fifty per centum of the amount of the stock subscribed by them has been paid in by the transfer of property. It is not to be gathered, therefore, from the letters patent that the sole purpose or even the main object of the company was the working of the mines, if mines there be, on or under the parcels of land so acquired by the company upon its incorporation, though it is scarcely to be doubted that this was the prevailing idea with the original incorporators. Under the letters patent and R.S.O. 1887, ch. 157, the objects, purposes and powers were the carrying on of mining operations and all other works in connection therewith in the District of Algoma, and to acquire, hold, alienate and convey real estate for its use and purposes anywhere within that district, if not elsewhere.

After its incorporation, the company sank some shafts and carried on some operations for a time, but in the course of two years or thereabouts the shares of the original incorporators, as well as the other shares of the capital stock, were acquired by others, the chief part of them having been purchased with the funds of another mining company called the Canada Copper Company, and vested in an officer of that company as trustee for its shareholders, and at the time of the institution of this action the defendant Stevenson Burke held 2,375 shares in trust. Of the remaining twenty-five shares, thirteen were held by the plaintiffs, seven by the individual defendants, and five by others. After the acquisition of the shares as above, a reign of inactivity ensued, until, as the result of proceedings taken and others threatened to forfeit the charter of the company, the directors were moved to take proceedings to sell the property of the company. On the 23rd of June, 1897, they resolved that the president and secretary-treasurer be authorized and empowered to sell the property, real and personal, of the company, and to that end to advertise it in such papers in Canada as they elect, the terms of sale to be cash, and to have the necessary notices served on the stockholders of the intention to do this. Thereupon a general meeting of the shareholders was called for and held on the 16th of July, 1897, for the special purpose of considering the advisability of a sale of all the assets of the company, real and personal, or of such portion as might be deemed advisable by the said meeting to sell, and, if considered advisable, to ratify and confirm a by-law passed by the board of directors in reference to the sale of the assets of the company, real and personal, and for other business.

At this meeting 2,296 shares were represented in person or by proxy. A resolution was presented confirming the action of the board of directors. An amendment was submitted which was voted down, the poll standing 7 shares in favour and 2,289 against. It is contended that the original resolution was not afterwards voted upon and passed, but upon the evidence I think the proper conclusion is that the motion was duly submitted and properly declared carried by the chairman. Thereafter the company caused the parcels of land owned by it to be advertised for sale by public auction at the office of the

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company at Copper Cliff, on the 23rd of August, 1897, and thereupon an action was commenced by certain shareholders against the company and the Attorney-General of Ontario to restrain the sale of the company's assets, and particularly the sale of the lands advertised for sale on the 23rd of August. Upon motion for injunction to restrain the sale made on the 21st of August, an order was pronounced whereby, upon the plaintiffs undertaking not to make any application to the Attorney-General or the Executive Council of the Province, or otherwise to the Government, or any administrative officer thereof, until after the expiry of the time limited by the order for the sale of the lands, to forfeit the company's charter or lands or other property, and upon the Attorney-General undertaking not to proceed with a pending application to forfeit the charter during the time limited, it was ordered that the sale be not proceeded with on the 23rd of August, and the defendants, the Vermillion Mining Company, submitted and agreed that no sale or disposal of the said lands, or any portion thereof, be made or had prior to the 15th of April, 1898, and then only after they should have been advertised for five consecutive months in certain specified journals and newspapers and in a specified form.

There can be no question but that the intended sale which was thus put a stop to was being conducted in a manner which could not be countenanced by any Court, and the object and intent of the order pronounced was to secure to those interested in the company and its property a sale brought on after due and proper advertisement, at an appropriate season of the year, and after affording to all or any intending purchasers a full and favourable opportunity of examining and testing the properties and their products. Any sale held regardless of attention to these matters, or ignoring due and proper measures for giving wide publicity to the proposed disposition of the properties, and affording every facility to persons likely to be interested in such properties to judge for themselves of their possibilities, could only be a careless, improvident and improper proceeding, or else be conceived for the benefit of interested parties desirous of securing the property at their own price. And that the object of the order was to guard against anything

of this kind the company and its managers must have been fully aware. In view of this, it is very unfortunate that not very long after the date of the order, the officers of the company should, under pretence of guarding the property from trespassers, have taken steps to drive away a number of persons who had gone up with the plaintiff McVittie to make an examination of the mines, and to dismantle and fill up with rocks, stones and earth the main shaft, thereby rendering a proper examination very difficult even in the summer season, and impossible at any other season of the year. And I think the proper conclusion from the testimony is that the company and its managers were not desirous of enabling others to make a thorough and proper investigation of the properties and to gain a knowledge of their probable capabilities and value.

No further steps were taken by the company to bring the properties to a sale until the year 1900. In March of that year an application was made to the Provincial Secretary to revoke the company's charter, and on the 31st of March an order in council was approved by the Lieutenant-Governor ordering that the charter be revoked, forfeited and made void, but reserving the power of waiving or cancelling such forfeiture within six months. This order, which was apparently made without notice to the company and without full knowledge of the facts, was rescinded on the 27th of July, 1900. On the 1st of October, 1900, the board of directors held a meeting, and the minute book shews the following: "The secretary submitted the order of Justice MacMahon of September 21st, 1897 [should be August 21st], about the sale of the Vermillion Mining Company property, and was authorized and instructed to advertise and sell said property in compliance with said order." There is no record of any other or further action by the board in reference to the sale of the properties.

Soon afterwards advertisements appeared announcing a sale of the parcels of land in question on the 14th of May, 1901. The advertisements are substantially in the form contained in the order pronounced by Mr. Justice MacMahon on the 21st of August, 1897, and the defendants in this action set up, and it must be taken as the fact, that the proceedings were instituted in assumed pursuance of the terms of that order. The advertisement states that the premises may at any time be inspected

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on behalf of intending purchasers. But nothing had been done, nor has anything yet been done, towards removing the obstructions placed in the main shaft or restoring the timber and framing to a condition which would enable the shaft to be cleared of water and permit of proper inspection and examination. Besides this, the season of the year intervening between the appearance of the advertisements and the date of the proposed sale was the very time during which the intending purchasers would be deterred from attempting an inspection or examination. In fact, the five months chosen for the running of the advertisements covered the very worst season of the year for shewing the property to advantage or attracting visitors to the locality.

This action was commenced on the 27th of December, 1900, against the company and also against the individual defendants as the persons alleging themselves to constitute the board of directors, and as the holders either beneficially or in trust of all but eighteen shares of the capital stock.

The statement of claim charges the individual defendants with having acquired the shares in the interest of the Canada Copper Company in order to control its conduct and affairs, and prevent the opening up of its mines and carrying on of its business, and sets forth a number of matters from which it is claimed it is to be inferred that the said charges are true. It questions the power of the company to sell the properties in question, and also the right of the individual defendants, as directors or otherwise, to direct or take proceedings for a sale of the properties. It also alleges that the conduct of the defendants in obstructing the access to the properties and in assuming to bring it to a sale under present conditions, are depreciatory of its value, and will result in deterring any but the Canada Copper Company from bidding for it and prevent a fair sale. It also questions the status of five of the individual defendants as directors, and charges that they hold no shares in their own right, and are not qualified to act as directors, and that no valid meeting of the shareholders for election of directors or other purposes has been held since June, 1890, and that all elections, resolutions and by-laws since that date are illegal and void.

The claim is (*a*) for an injunction against any sale, disposition or parting with the real estate in question by the defendants, and also against proceeding with the sale advertised for the 14th of May, 1901; (*b*) for an injunction against defendant Burke continuing to act as a director and from voting upon the shares held by him in trust; (*c*) a declaration that defendant Burke is not the properly constituted trustee of the shares standing in his name, and has no right to vote on them; (*d*) a declaration that the defendants Burke, Paget, McIntosh, McArthur, and Turner are not qualified to act as directors, and have not been legally elected; (*e*) other relief.

The statement of defence, besides denying the title of some of the plaintiffs as shareholders, and the charges of misconduct alleged against themselves, sets up that the proposed sale is being proceeded with in all respects under and in accordance with the terms of the order of Mr. Justice MacMahon, and that a sale was duly authorized by resolution of the directors, and approved of by a meeting of the shareholders.

At the trial before Street, J., it appeared that subsequently to the commencement of the action the shares held in trust by the defendant Burke had been distributed *pro rata* amongst the shareholders of the Canada Copper Company. The title of the plaintiffs as shareholders was not seriously questioned, and is not now in dispute.

Street, J., dismissed the action on the ground that the company had power to sell the lands in question, and that the circumstances justified the action of the directors in proceeding with the sale. He also held that the alleged irregularities with regard to the meetings of shareholders, the elections of directors, and the meetings of the board, could not be considered as invalidating the proceedings towards the sale.

The plaintiffs' principal object is to obtain a declaration as to the power of the company to sell and dispose of the lands in question. It is argued that such a sale is *ultra vires*, at least in the sense that it can only be carried into effect with the consent of all the shareholders, and that it is competent for any objecting shareholder to stop any such contemplated sale.

Since the Act 60 Vict. ch. 28 (O.) came into force on the 13th of April, 1897, the company has had, in addition to its

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other powers, the power to acquire by purchase, lease, or other title, and to hold, use, sell, alienate and convey any real estate necessary for the carrying on of its undertaking: sec. 25 (*g*). These are very considerable increases to the original powers of the company, and apparently are wide enough to enable it to make disposition of the whole or any portion of its real estate, not excluding even those portions which may have been acquired for the carrying on of the undertaking.

In the face of these provisions, it seems to me impossible to say that the company has not the power to sell the real estate in question if in good faith the majority of the shareholders decide to do so.

I do not say that if, upon the face of the letters patent, it plainly appeared that the main purpose of the company was the acquisition of and working the mines upon the properties in question, and that this purpose formed the foundation of the company, it might not even yet be held that it was not within the power of the company to put an end to that purpose by a sale of the properties without the consent of all the shareholders. But this does not and cannot be made to appear. The sale of these properties need not disable the company from carrying on its operations as a mining company within the District of Algoma. It does not work a dissolution of the corporation, nor put an end to its powers.

I agree, therefore, that the company has power to make sale of the properties in question. I think the objections to the status of the directors have been properly disposed of, and that it was competent for them to proceed with a sale under proper conditions.

But I am of opinion that the proposed sale on the 14th of May, 1901, ought not to have been allowed to proceed, and that while as to all other matters the action was rightly dismissed, it ought to have been retained for the purpose of enjoining that sale.

The attempt to sell without having put the properties into a condition in which they might be properly inspected and examined by intending purchasers, and fixing the date of the sale at a time which rendered any inspection or examination before it was held a matter of extreme difficulty, if not an

impossibility, was not a compliance with, but, on the contrary, a violation of the spirit of the order of the 21st of August, 1897, in pursuance of which the defendants were professing to make the sale. I have already made reference to the manner in which the sale proceedings were being conducted.

Under the circumstances, if the sale had taken place as intended, it could not have failed either to have proved wholly abortive for want of bidders, or to have resulted in the properties falling into the hands of the Canada Copper Company, as the plaintiffs allege the defendants designed they should, at an inadequate price.

The proceedings in this Court arrested the sale, and there is now an opportunity of bringing the properties into the market in such manner as to secure the most favourable terms of sale, and protect the interests of all the shareholders.

It is not now necessary to retain the action, but I think that, inasmuch as the plaintiffs were right in their contention on this branch of the case, though they have failed in the others, there ought to have been no costs of the action, and there should be no costs of this appeal.

ARMOUR, C.J.O., and OSLER, J.A., concurred.

LISTER, J.A., died before the delivery of judgment.

Appeal dismissed, with variation as to costs.

R. S. C.

[IN THE COURT OF APPEAL.]

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MUTCHMOR v. WATERLOO MUTUAL FIRE INSURANCE COMPANY.

Insurance—Fire Insurance—Conditions—Prior Insurance—Subsequent Insurance Substitution of Policies—Implied Assent—Adjustment of Loss—Waiver.

In an application for insurance, particulars of prior insurance in two other companies of $4000 in each company were given, but in the policy in ques- prior insurance of only $4000 was assented to, neither company being named. The defendant pleaded as a breach of the statutory condition non-disclosure of prior insurance for $4000 in one of the two companies:—

Held, that the plea must be read strictly and without amendment and that so read the assent in the policy to insurance of $4000 might be treated as an assent to the prior insurance complained of in the plea; and *semble*, that had the defendants not intended to assent to the prior insurance of $8000 they would have been bound under the second statutory condition to point out in writing the particulars wherein the policy differed from the application.

Held, also, that to a subsequent insurance for $4000 in another company in substitution for a prior insurance to that amount in one of the two companies mentioned in the application, the assent of the defendants was not necessary.

Assent, express or implied, to subsequent insurance is sufficient even if given after the loss has occurred. In this case such assent was held to be sufficiently shewn by the defendants joining in the adjustment of the loss and allowing the insured to accept from the subsequent insurers their proportion of the loss as so adjusted.

Judgment of Ferguson, J., affirmed.

APPEAL by the defendants from the judgment at the trial.

The action was brought by the plaintiff, as liquidator of the William Lamb Manufacturing Company, to recover $3,350 as the proportion of a loss by fire payable by the defendants under a policy for $4,000 upon property of the company. The main defence of the company was that there had been both prior and subsequent insurance to which they had not assented.

The action was tried at Ottawa in April, 1901, before Ferguson, J., and a jury. The facts were found in the plaintiff's favour, and on the 15th of July, 1901, judgment was given for the amount claimed. The facts, so far as necessary to make clear the legal points involved, are stated in the judgment in this Court.

The appeal was argued before ARMOUR, C.J.O., OSLER, MOSS, and LISTER, JJ.A., on the 22nd and 23rd of January, 1901.

Aylesworth, K.C., for the appellants.

Wallace Nesbitt, K.C., and *T. A. Beament*, for the respondent.

The following cases, among others, were referred to:—As to the effect of the knowledge and assent of the local agent: *Torrop* v. *Imperial Fire Ins. Co.* (1896), 26 S.C.R. 585; *Logan* v. *Commercial Union Assurance Co.* (1886), 13 S.C.R. 270; *Hendrickson* v. *Queen Ins. Co.* (1877), 31 U.C.R. 547; *Billington* v. *Provincial Ins. Co.* (1877), 2 A.R. 158, (1879), 3 S.C.R. 182; *Shannon* v. *Gore District Mutual Fire Ins. Co.* (1878), 2 A.R. 396; *Frazer* v. *Gore District Mutual Fire Ins. Co.* (1882), 2 O.R. 416; *Bawden* v. *London, Edinburgh and Glasgow Assurance Co.*, [1892] 2 Q.B. 534. As to the substitution of insurance: *Parsons* v. *Standard Fire Ins. Co.* (1880), 5 S.C.R. 233; *Lowson* v. *Canada Farmers Mutual Fire Ins. Co.* (1881), 6 A.R. 512; *Moore* v. *Citizens Fire Ins. Co.* (1888), 14 A.R. 582. As to estoppel or waiver by joining in the adjustment: *Morrison* v. *Universal Marine Ins. Co.* (1873), L.R 8 Exch. 197: *Smith* v. *City of London Fire Ins. Co.* (1887), 14 A.R. 328, (1888), 15 S.C.R. 69; *Western Assurance Co.* v. *Doull* (1886), 12 S.C.R. 446; *Commercial Union Assurance Co.* v. *Margeson* (1899), 29 S.C.R. 601; *Atlas Assurance Co.* v. *Brownell* (1899), 29 S.C.R. 537; *Insurance Co.* v. *Norton* (1877), 96 U.S. 234; *Travellers Ins. Co.* v. *Edwards* (1887), 122 U.S. 457, at p. 467; *Fonderie de Joliette* v. *Stadacona Fire Ins. Co.* (1883), 27 L.C. Jur. 194; *Klein* v. *Union Fire Ins. Co* (1882), 3 O.R. 234; *New York Life Ins. Co.* v. *Baker* (1897), 27 Ins. L.J.N.S. 350; *Missouri Trust Co.* v. *German National Bank* (1896), 77 Fed. Rep. 117.

October 9. The judgment of the Court was delivered by OSLER, J.A.:—The company defend the action on two grounds, the first being that at the time of the application for the policy, and at the time of issuing it, there was prior insurance upon the insured premises in another company, the Hand-in-Hand Fire Insurance Company, to the extent of $4,000, which was not assented to by the defendants, and that no assent thereto by them is endorsed thereon, nor does it appear therein; therefore, under statutory condition 8, the defendants are not liable on their policy.

This defence fails. In the application for insurance in the defendant company, it is stated that there is prior insurance in

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two companies, specifying the Hand-in-Hand Fire Insurance Company, and the Sun Fire Insurance Company, apparently $4,000 in each, with which the insurance applied for is intended to be concurrent. In the defendants' policy they refer to the property insured by them as "represented in the application as otherwise insured for $4,000, warranted concurrent," but do not specify the company in which such insurance exists. They plead only a prior insurance in the Hand-in-Hand Fire Insurance Company, not assented to, saying nothing about the Sun Fire Insurance Company. The application proves notice to them of both, and it must be taken against them that this is the one they intended to assent to in the policy. This may, indeed, be said to be proved by the letter of the defendants' general manager to their Ottawa agent of the 3rd of November, 1899, in face of which the defence set up by the third paragraph of the statement of defence bears a most dishonest appearance. If there was also further insurance of $4,000, that is, $8,000 in all, to which the defendants' assent was not manifested as required by the statutory condition, they have not pleaded that as a defence, nor would it be just to allow them now to set it up. It was not necessary that the particular company in which the prior insurance existed should have been specified in the policy. The amount of the insurance was the important thing, and the application gave the necessary details. I am disposed also to agree with the learned Judge in thinking that if the defendants did not intend to assent to the existing insurance for $8,000 in all, in the Hand-in-Hand Fire Insurance Company and in the Sun Fire Insurance Company, they were bound by the second statutory condition to point out in writing the particulars wherein the policy differed from the application: *Smith* v. *City of London Fire Ins. Co.*, 14 A.R. 328, at p. 330.

In the absence of such distinct notice the policy would be very likely to prove a mere trap to catch a premium, and to deceive the insured into the belief that he might safely retain both the existing policies.

The company's next defence arises under the second branch of the eighth condition, which declares that the company is not liable for the loss, if any subsequent insurance is effected by

any other company, *unless and until* the company, *i.e.*, the former company, assents thereto, or unless the company does not dissent in writing within two weeks after receiving written notice of the intention or desire to effect the subsequent insurance, or does not dissent in writing after that time and before the subsequent or further insurance is effected.

In support of this defence the defendants rely upon two subsequent insurances effected by their insured, but not notified to, or assented to, by them ; one in the London Mutual Fire Insurance Company for $4,000, and the other in the Lancashire Fire Insurance Company for $2,000. These insurances were proved. As to the insurance in the London Mutual Fire Insurance Company the plaintiff's answer is that the Hand-in-Hand policy was cancelled, for what reason does not appear, and the London Mutual policy was merely taken in substitution for it.

There is some evidence that the policy in question was taken in substitution for the other. One was dropped or cancelled, and the other for a similar amount put on. There is no suggestion that the Hand-in-Hand Fire Insurance Company cancelled on the ground of fraud or doubtful character of the risk, and I do not see that the fact of the sum insured having been somewhat differently distributed in the later from what it was in the earlier policy, can affect the substance of the matter, which is a consent once manifested in the prescribed manner, to a prior further insurance for a specified amount. I think there was evidence on which the jury could properly have found, as they did, that the one policy was merely taken in substitution for the other, and that being so the statutory condition is not infringed, the substituted insurance being covered by the standing consent. I refer to *Parsons* v. *Standard Fire Ins. Co.*, 5 S.C.R. 233 ; *Lowson* v. *Canada Farmers Mutual Fire Ins. Co.*, 6 A.R. 512 ; *Moore* v. *Citizens Fire Ins. Co.*, 14 A.R. 582 ; *Klein* v. *Union Fire Ins. Co.*, 3 O.R. 234, at p. 262.

The insurance in the Lancashire Fire Insurance Company is in a different position. It was, no doubt, strictly a subsequent insurance, and the defendants are not liable on their policy unless they have assented thereto ; or have so acted as to estop themselves from saying that their policy is not an

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existing one. No form of assent is prescribed by the condition, nor any time at which it is to be given. It, therefore, need not necessarily be manifested in writing, and may be given before or after the loss. Where a subsequent insurance has, in fact, been effected without notice, notice of it in writing is not a pre-requisite to a valid assent. Such notice is necessary only where the insured intends to effect a further insurance thereafter, and to place the company under the obligation to dissent in writing within the prescribed time if they object to it; their failure to do which is equivalent to an assent.

The insurance in the Lancashire appears to have been written by the local agent of the defendants, one Stewart, who was also local agent for that company; and by him or by his clerk a note of that insurance was made in a register of applications for insurance furnished by the defendant company, on the duplicate or copy of the application therein for the policy now in question. No notice of that insurance was sent by him to the defendant company previous to the fire, which occurred about the 8th of September, 1900. On the 10th of September defendants' local agent telegraphed to the head office "Lamb Manufacturing Company, total loss. Other companies on risk, Sun, *Lancashire,* and London Mutual." On the same day the defendants by their general manager, Mr. Haight, instructed Mr. Chas. D. Cory, an insurance adjuster and appraiser, to act for them in adjusting the loss, and wrote to their local agent as follows: "Re policy No. 220554, Wm. Lamb Manufacturing Company. Enclosed herewith I beg to hand you claim papers to be employed in the adjustment of the above. I have instructed Mr. Chas. D. Cory, of Toronto, who goes to Ottawa to adjust this loss, to adjust for the Waterloo. You will find him at the Russell. Kindly hand the papers to him, and very much oblige, etc."

On the 15th of September, 1900, Cory prepared the claim papers, had them signed by the insured, and on the same day, on behalf of the defendants and the three other companies interested, proceeded, in conjunction with the agent or appraiser of the insured, to appraise the loss or damage; and adjusted the same. He then returned the claim papers to the defendants

with his certificate thereon as adjuster, in which he sets forth that the insured had sustained loss or damage by the fire; that he had examined into all the circumstances in connection with the loss, the evidence on which the claim was based, etc., and that he was fully satisfied that the insured had sustained loss or damage to the amount of $12,000, payment of which sum he recommended therefore in full, of which the defendants' proportion was $3,350.

The claim papers give the details of the Lancashire and other insurances on the property.

It does not appear when the defendants first determined to resist the claim, or gave notice to the assured or the plaintiff that they intended to do so; but on the 9th of October, 1900, in reply to the plaintiff's letter asking if the defendants had a policy through Mr. Stewart's agency on the Lamb Manufacturing Company's property, and if the loss had been paid or assigned, their manager wrote saying that they had the insurance at the time of the fire, and that the loss had not yet been paid or the policy assigned.

It appeared or was conceded that all the other companies had settled on the basis of the adjustment, though in the case of one of them this was not until after action brought.

Several questions were left to the jury, and it was agreed by consent that all matters not disposed of by their answers to these questions should be determined by the Court. The first and second questions relate to the Hand-in-Hand Fire Insurance Company, Sun Fire Insurance Company, and London Mutual Fire Insurance Company, and these need not be further referred to. Questions 3, 4, 5 and 9 relate to the insurance in the Lancashire Fire Insurance Company, and the contentions as to notice to and assent by the local agent. These may be disregarded as, the plaintiff's right to recover depends upon the effect of what took place on and after the 10th of September. As to this the findings of the jury are that the company's head office was aware, at the time of sending Cory, the adjuster, of all the insurances which are now complained of being on the risk; that the company intended, by such act, to treat the policy as valid and subsisting and binding upon it,

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and that the insured entered into an appraisal with the company's adjuster, and accepted such appraisal and altered their position on the faith of it.

These findings are well supported by the evidence, from which also it ought, in my opinion, to be inferred that the defendants assented to the subsequent insurance in the Lancashire Fire Insurance Company. Their defence as to this insurance is, therefore, displaced on the ground of assent or estoppel, or both.

The telegram from their local agent conveyed a plain intimation to every one familiar with the language of insurance business that there was a subsequent policy in the Lancashire Fire Insurance Company on the property insured by the defendants. Their case is that their local agent had no authority to assent to such insurance, so that the notice they had was of a subsequent insurance to which they had not formally assented, and if they then intended to take advantage of this as a defence they had only to hold their hand and remain passive. Instead of this they at once appointed an adjuster to appraise the damage and loss, and adjust the proportions in which the latter should be borne between themselves and the other insurance companies. This was a plain intimation to the insured that they were treating themselves as his insurers notwithstanding the subsequent insurance with the Lancashire Fire Insurance Company; and it appears to me that they must necessarily be held to have assented to that policy as a subsequent insurance within the meaning of the condition, when, with knowledge of it, they instructed an adjustment to be made which involved an appraisement of the loss with the agent of the insured, and the ascertainment of the share of the loss to be borne by the several companies on the footing that they were all on existing policies. The making out of the claim papers for the insured by the adjuster was done on the instructions and by authority of the defendants. It is a further indication that they regarded their policy as an existing one; and it is a significant fact pointing in the same direction, that as late as the 9th of October, weeks after the receipt of the claim papers, the defendants answered the plaintiff's letter on the subject of the

policy without the least intimation that they were not holding themselves liable thereon. On the ground of estoppel I agree with the learned Judge that the defendants are precluded from setting up the defence of a subsequent insurance not assented to by them. It is plain that on the faith of what the defendants' authorized agent had done the insured altered their position by settling with the other companies in which they were insured, on the footing of the defendants' existing liability. The case is distinguishable in many respects from *Western Insurance Co.* v. *Doull*, 12 S.C.R. 446, but mainly on the ground that in that case the insurance company had "no notice nor any actual cognizance of the further insurance" when they instructed their inspector to adjust the loss. The terms of the condition, too, were very different from, and more stringent than, those in the case at bar, and the only notice the plaintiffs were able to prove was oral notice to an agent not authorized to receive it. I refer to the following cases: *Smith* v. *City of London Fire Ins. Co.*, 14 A.R. 328, 15 S.C.R. 69; *Morrison* v. *Universal Marine Ins. Co.*, L.R. 8 Exch. 197, at pp. 203, 205; *New York Life Ins. Co.* v. *Baker*, 27 Ins. L.J.N.S. 350; *Missouri Trust Co.* v. *German National Bank*, 77 Fed. Rep. 117, at p. 121; *Fonderie de Joliette* v. *Stadacona Fire Ins. Co.*, 27 L.C. Jur. 194.

For these reasons I am of opinion that the judgment should be affirmed, and the appeal dismissed with costs.

Appeal dismissed.

R. S. C.

[IN THE COURT OF APPEAL.]

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IN RE LEACH AND THE CITY OF TORONTO.

Assessment and Taxes—Local Improvements—Sidewalk.

Under the agreement of the 20th of March, 1889, entered into by the Crown as representing the University of Toronto, and the city of Toronto, confirmed by 52 Vict. ch. 53 (O.), College street in the city of Toronto has become so far a public highway of the city as to make the interest of a lessee from the Crown of land fronting on that street liable to assessment for the due proportion of the cost of the construction as a local improvement of a sidewalk in front of the leased land, even though the lease has been made before the agreement.

CASE stated under section 85 of the Assessment Act, R.S.O. 1897, ch. 224, for the opinion of the Court of Appeal, as to the right to assess the interest of a lessee of the Crown, of land fronting on College street in the City of Toronto, for a portion of the cost of a sidewalk. The facts are stated in the judgment.

The case was argued before OSLER, MACLENNAN, and GARROW, JJ.A., on the 9th and 12th of May, 1902.

John A. Paterson, for the lessee.

Fullerton, K.C., and *W. C. Chisholm*, for the city.

October 9. OSLER, J.A.:—The material facts may be very shortly stated. In the year 1859, by authority derived under 22 Vict. ch. 110, the City of Toronto became lessees of the Crown at a yearly rental of five shillings if demanded, for the term of 999 years, of lands within the limits of the City of Toronto, including certain named avenues and other approaches thereto, to be used for the purpose of a public park and for no other purpose. This is the park commonly called Queen's Park. The whole of this property, and other property adjacent to it, had been at one time the property of the University of Toronto, but was vested in the Crown by the Provincial Act, 16 Vict. ch. 89, for the purposes mentioned therein, which, substantially, were the maintenance of the University, and the property so transferred was managed from that time by the persons or bodies, and in the manner, prescribed by that and other Acts.

One of the avenues referred to was known as the Yonge Street Avenue, or the cross avenue from Yonge Street. By the lease the city covenanted *inter alia* to pay the yearly rent of five shillings, if demanded, free and clear of taxes, etc., and also to "pay and satisfy all taxes, charges, assessments, etc., municipal, parliamentary, or otherwise, which now are, or which hereafter shall during the said term, be payable, *in respect of the said parcels of land and premises hereby demised, and intended so to be, whether the same be rated or assessed on the landlord or tenant thereof.*" And also that they would at all times thereafter, "suffer and permit . . . all and every person and persons, and their heirs and assigns, to whom the Senate of the University shall lease or sell building lots fronting on the public park, or in the avenues, *to have free access through* the park and avenues."

"And also that the corporation of the City of Toronto shall put in repair, and at all times hereafter maintain, uphold and keep in proper state of repair, the lodges connected with the avenues and park, now erected or which may require to be erected, together with the gates and fences belonging to the said avenues and park, either erected or to be hereafter erected; and shall also uphold and keep in a thorough state of repair, not only the avenues now laid out, but also the approach by Wellesley Street to the said park, . . . and shall also provide that proper care shall be taken of the said grounds, etc.

And the said corporation shall also, within one year from the date hereof, construct all roads and approaches as laid down in the plan hereto annexed, to the said park, and repair the lodges, fences, gates and roads requiring repair, in anywise connected with or belonging to the premises hereby demised."

A plan of building lots of part of the land vested in the Crown under the Act above referred to, adjoining the avenues and park, was afterwards prepared by the University authorities, and in June, 1874, parts of two of these lots, viz., of lots 1 and 4 fronting on Yonge Street Avenue, became vested in the appellant for the residue of a term of 42 years therein, which had been granted by the Crown to the late Mr. F. W. Cumberland in the previous month of May.

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Subsequently the appellant surrendered his interest to the Crown, and by a new lease, bearing date the 1st of July, 1884, the Crown demised to him for the term of 31 years and 8 months from that date, parts of the said building lots, which included the land included in the lease of 1874, with a certain additional portion of lot 4. The parcel so demised fronts on the Yonge Street Avenue, and is the land of which the appellant is now possessed. The lease purports to be made under the Act respecting short forms of leases, and contains *inter alia* a covenant on the part of the lessee to pay taxes and to repair. No reference is made to any right of way in or over, or access to or from, the avenue in either this lease or that of 1874.

On the 19th of July, 1883, previous to the granting of the lease to the appellant, the University, with the assent of the Lieutenant-Governor-in-Council, had granted to the city the license or privilege of laying down a street railway along the Yonge Street Avenue to College Street. This grant was declared to be for the purpose only of laying down the street railway, and of giving access to the Yonge Street Avenue from streets then opening into it, and it was not to be construed as having or intended to have any greater effect, or as altering or waiving any term of the existing lease further than was necessary for these purposes. The city covenanted to observe the stipulations in the grant or license to be by them performed, and also all the covenants, provisoes and conditions in the lease of April, 1859, and there is a proviso that the grant was on the express condition that if that lease should at any time become forfeited by the city, under the provisions therein contained, and the University should re-enter upon the lands demised, then the agreement should thereafter cease and determine, and be utterly void to all intents, etc.

In February, 1886, an action was brought on behalf of the Crown for the purpose of avoiding the lease of 1859, on the ground of non-performance by the city of the conditions of the lease, and on the 31st of January, 1888, judgment was pronounced whereby the lease was declared to be forfeited and avoided, and ordered to be given up to be cancelled.

On the 20th of March, 1889, after many conferences between the University authorities and the city looking to the re-instatement of the latter in the possession of the valuable privileges which had thus by their carelessness become lost to the public, an agreement was entered into between Her Majesty and the city, whereby it was agreed that the said judgment should be vacated by the Court, and the action in which it had been obtained dismissed, and the parties thereto mutually acquitted, released and discharged, each the other, of all claims and demands, etc., in respect of any breach of any covenant or condition in the lease of 1859, and in respect of agreements modifying the same, and in respect of the property by the lease demised, and all breaches of the said lease and agreement theretofore committed were thereby waived by Her Majesty.

It was further witnessed by the agreement: "2. That the cross-avenue from Yonge Street, . . and the avenue from Queen Street and the other approaches to the park are (subject to the conditions hereinafter set forth) to be, and are hereby dedicated by Her Majesty to the public, and all restrictions as to traffic thereon . . are hereby removed, but this dedication of the said avenue and approaches for the purposes of traffic, as aforesaid, is not to affect the right of Her Majesty . . to prevent the owners of properties adjacent to the said avenues and approaches, who had not at the date of this agreement the right of ingress or egress to and from their said properties, from and to the said avenues and approaches, . . from exercising such right, unless and until the same shall have been acquired by payment to Her Majesty, or Her successors, . . of such sums as may be agreed upon by and between such persons and the bursar of the University.

3. And whenever and as soon as any property in and about the said Queen's Park, or upon any of the avenues or approaches thereto, now vested in the Crown in trust for the University of Toronto, is leased, sold or otherwise disposed of, the estate or interest therein of the lessee or purchaser or occupant thereof, shall become liable to assessment for local improvements in like manner and to the same extent as any other assessable

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real estate ; but this provision is not to make the estate of the Crown in such lands liable in any way to assessment, and until so leased (*sic*), sold, or otherwise disposed of, the interest of the Crown therein shall not be (as hitherto it has not been) taxable for such improvements.

5. That the said lease of the first day of January A.D. 1859, as modified by the hereinbefore recited agreements, and by this agreement, shall be and remain in full force and effect according to the terms, provisoes and conditions thereof."

Then follow clauses by which the city, for the consideration aforesaid, agrees to endow and maintain during the residue of the term of the lease of the 1st January, 1859, two chairs in the University of Toronto, at an annual cost of $3,000 for each chair.

By statute, 52 Vict. ch. 53 (O.), the above agreement, subject to the other provisions of the Act, was validated and confirmed. The provisions referred to, relate solely to the rights reserved to Her Majesty by the 2nd clause of the agreement, and have no bearing upon the question raised by the special case : see *Palmer* v. *Jones* (1901), 2 O.L.R. 632.

In the year 1899, the city proposed to assess the appellant by proceedings, the formal regularity of which is not in question, taken under the local improvement clauses of the Municipal Act, for a local improvement, viz., a wooden sidewalk to be laid down upon the north side of the cross avenue from Yonge Street (now called College Street) opposite to his and other properties on that street. The assessment was confirmed by the Court of Revision, and an appeal therefrom to the county Judge was dismissed by him.

The case now comes before the Court on a case stated by the Lieutenant-Governor-in-Council, under section 85 of the Assessment Act, R.S.O. 1897, ch. 224.

The question submitted to the Court is whether in view of the deeds, documents, agreements and statutes referred to, the said Leach or his interest in the property of the Crown so leased to him, is liable for local rates for the sidewalk in question ; or whether the corporation of the City of Toronto is liable under its covenants and agreements with the Crown, to maintain the sidewalks upon the said street in proper order at

the expense of the City of Toronto, and so as to free the said Leach therefrom as a local improvement.

The main argument for the appellant proceeded, I think, upon a misconception of his position in relation to the lease to the city of 1859. He seems to have considered that as a subsequent lessee of the Crown of lands fronting on the avenues, he had some right or interest in maintaining the conditions created by the earlier lease in respect of the city's obligation to keep the avenue in repair. I think this is a mistake. The appellant had, as lessee of the Crown, a right of access to and from the front of his premises. Of that he could not be deprived, and the city had covenanted with his lessor that he should be permitted to enjoy it. He had no right as against the city, to compel them to keep the avenues in repair. The Crown had rights in that respect under the city's covenant, but these were rights which it might have released or refused to enforce, and they would come to an end with the forfeiture of the lease.

Short of interfering with the right of access, there was nothing in the situation of all three parties to prevent the Crown from dealing with the city without regard to the appellant. It might have maintained the forfeiture of the lease, or might have re-instated it with such variations in its terms as might be agreed upon; and of these, so long as the appellant's access was not interfered with, he would have no right to complain. The latter course was taken, the forfeiture was waived, the lease was set up again, the rental being increased from $1 to $6,000 per annum; and the Crown dedicated to the public, without restriction, the two principal avenues to the park, from Queen Street and Yonge Street, which the city had by the lease of 1859 agreed to keep in repair. I say without restriction, because the right reserved by the Crown to require the owners of property adjacent to the avenues who had not theretofore acquired rights of access thereto, to pay for the same, does not affect the appellant or the character of the highways so dedicated. The avenues became public highways which, by section 601 of the Municipal Act are vested in the city, and the city is bound by section 606 of the Act to keep them as such in repair. The obligation

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of the city now, therefore, rests upon the statute, not upon its covenant, which ceases to have any application under the new state of things.

It was pressed upon us that the Crown could not by dedication or otherwise, consequent upon a private agreement between itself and the city, alter the character of the right of way which the appellant had over the avenues. The way was simply converted into a public highway, and I am not aware of any legal right of the appellant which was infringed thereby. His right of user of the road was not derogated from or made more onerous, and if new liabilities are, or may be, cast upon him as an adjoining property owner in consequence thereof, he is in no worse situation than a freeholder adjoining whose property a new street has been opened, or whose private right of way, such as the appellant had over the property of another, has been enlarged by expropriation or dedication of the land over which it exists as a public highway. The city's covenant with the Crown to permit persons in the situation of the appellant to have "free access through the park and avenues" necessarily came to an end with the forfeiture of the lease. We may suppose that as tenant of the Crown he would still have a right of access through the avenue. But this could not control the right of the Crown to dedicate the avenues as public highways, a right which it exercised in re-instating the lease.

It was also argued by Mr. Paterson that the third clause of the agreement shewed that the intention of the parties was that the estate or interest of existing leaseholders fronting on the avenues should not be liable to assessment for local improvements. I think this clause is an attempt to provide for the case of future leaseholders, but it goes no further. There is no express exemption of others. They are simply left to the operation of the general law which in the case of such an improvement as that in question here, viz., a plank sidewalk, appears to be found in section 677 of the Municipal Act. But in the case of the local improvements, the power to make which depends upon the consent, expressed or implied, given, or not withheld, of the owners of the property to be benefited, the question whether a person in the situation of

appellant, *i.e.*, a lessee of the Crown under whose covenant "to pay taxes" no liability to pay taxes for local improvements to his lessor can arise or exist can be regarded as an owner within the meaning of section 668 (2), and other clauses of the local improvement code of sections, is one of great importance, and, to my mind, does not admit of an easy solution in favour of the respondents. This, however, is not before us nor involved in the determination of the appeal

The questions submitted will, therefore, be answered: that the interest of the appellant in the property leased by him from the Crown, on College Street, is liable to be assessed for local rates for the plank sidewalk in question, under section 676 of the Municipal Act; and that the corporation is not liable under its former covenants and agreements with the Crown, or otherwise than under the Municipal Act, to maintain the same.

MACLENNAN, J.A.:—At the close of the argument I was of opinion that College street, on which the appellant's property abuts, was and is, ever since the indenture of the 2nd of March, 1889, between the Crown as representing the University of the one part and the city of the other, confirmed by Act of the Legislature, 52 Vict. ch. 33, a public highway, in respect of which the right and duty of maintenance, renewal and repair both of the roadway and sidewalk are cast upon the city. Further consideration has not led me to change that opinion. It is true that the dedication which is the result of that indenture and Act is qualified to the extent that some persons whose properties abut upon the street have no direct right of access, but that does not make it less a highway, subject to the jurisdiction of the city, nor does it impair the right of the city to charge the cost of improvements thereon upon those whose property is benefited thereby, such as the appellant, who has the ordinary and usual right of access to the street.

The appellant's lease was made on the 1st of July, 1884, at a time when the street was a mere road in the park, and perhaps not a highway within the meaning of the Municipal Act, although the street railway ran upon it, and the city was bound by covenant to maintain it with roadway, boulevard and sidewalks of defined character and width. It was argued for

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the appellant that his lease having been made before the indenture and Act of 1889 he was not affected by them. I am unable to take that view. There is no privity between the appellant and the city, and the moment the road became a highway, the ordinary legal consequences followed.

The street in question then being a highway within the city, and the appellant being a leaseholder whose property abuts thereon, the question is whether he can be lawfully charged with a proportion of the cost of a sidewalk constructed by the city, under the local improvement sections of the Municipal Act.

The various sections of the Municipal Act dealing with the subject, namely, section 664 and following sections, impose the liability in terms only upon the *owners* of property to be benefited, and it might be doubtful whether leaseholders or tenants were owners within the meaning of the Act. But sec. 668 (2) declares that where the word "owner" occurs in the sections, it shall be construed and deemed to include a leaseholder the unexpired term of whose lease including any renewals therein provided, extends over a period which is not less than the duration of the proposed assessment, if the lessee has covenanted in his lease to pay all municipal taxes on the demised property, during the term of said lease, and would be liable for the taxes for the proposed improvements.

But for this sub-section it would seem that no leaseholder would be liable for the tax, the clauses speaking only of owners, and the Assessment Act, which is *in pari materiâ* distinguishing between owners and tenants in its provisions. The question is whether the appellant is within this sub-section (2). He is a leaseholder, and his unexpired term, with renewals, is sufficient. He has also covenanted in his lease to pay all municipal taxes during his term. There is, however, a further description of the leaseholder who is to be liable, namely, he is to be one "who would be liable for the taxes for the proposed improvements." What is the construction of these words? Are they to be read in an absolute or a limited sense? If in an absolute sense the whole sub-section is rendered inoperative and nugatory. It seems to say this: A leaseholder shall be liable for local improvements, under these sections, just as an

owner is, provided his term is of a certain length, and he has covenanted in his lease to pay taxes, and provided also he would be liable to pay them. That is, he shall be liable, if he would be liable. But he is not liable independently of this section, nor unless this section makes him so, and so if antecedent liability is essential to the operation of this sub-section, it can have no operation at all. I think we must, in order to give effect to the enactment, put a limited construction on the words if they admit of it, and I think they do. Under the provisions of the Assessment Act a leaseholder may be exempt from taxation altogether. Under sec. 7 (13) the house of an officer in the Army or Navy would be exempt if under $2,000 in value, and it might be a long lease with a covenant for payment of taxes. So long as its value was under $2,000 he would be free, but if the value rose so as to exceed $2,000 he would be liable to be assessed; so also if he assigned his lease to a civilian the property would at once be assessable, and a covenant from such an officer to pay taxes would be as proper in a lease taken by him as in any other. Under sub-sections 3, 4, 5 and 7, also of the exemption section 7, there might be other long leaseholds which would be exempt, as for example a college or school partly supported by legislative grant, or a hospital, as in the case of the hospital in question in *Struthers* v. *Town of Sudbury* (1900), 27 A.R. 217.

In all such cases a prudent lessor, and even the Crown, making a long lease, and particularly with a perpetual renewal, would take a covenant for the payment of taxes, for the lease might be assigned or sold, and the lessor might desire to sell the reversion whereby the property would at once become subject to assessment and taxation.

These being all cases in which the leaseholder "would not be liable for the taxes of the proposed improvements," and there being other such cases under the exemption clauses of the Assessment Act, I think the Legislature meant such cases by the words used, and that leaseholders would be liable just as owners are, unless they were persons expressly exempted by law.

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I think our judgment should be for the respondents.

Garrow, J.A.:—I agree with my brother Osler.

Assessment upheld.

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[IN THE COURT OF APPEAL.]

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Sept. 19.

Sawers v. City of Toronto.

Assessment and Taxes—"Owner"—Person in Possession under Agreement to Purchase—R.S.O. 1897, ch. 224, sec. 135, sub-sec. 1 (3).

A person in possession of land under an agreement to purchase, is the owner thereof within the meaning of sub-section 1 (3) of section 135 of the Assessment Act, R.S.O. 1897, ch. 224, and liable to pay the taxes chargeable against it.

Judgment of Boyd, C., 2 O.L.R. 717, affirmed.

An appeal by the plaintiff from the judgment of Boyd, C., reported 2 O.L.R. 717, was argued before Osler, Maclennan, Moss, and Garrow, JJ.A., on the 6th and 7th of May, 1902. The facts are stated in the report below, and the line of argument is there indicated.

J. W. McCullough, and *S. W. McKeown*, for the appellant.

Fullerton, K.C., and *W. C. Chisholm*, for the respondents.

September 19. The judgment of the Court was delivered by Garrow, J.A.:—Many reasons were urged upon us by the plaintiff's counsel why we should reverse the judgment appealed from, some of law and some of fact, the latter involving questions of credibility between the witnesses on behalf of the plaintiff and those for the defendants. Especially is this the case with reference to the important question of whether the defendants' bailiffs abandoned the seizure, the plaintiff's witnesses deposing very positively that Douglass, the man in charge, upon being shewn the receipt, at once completely retired from and abandoned the seizure, while those for

the defendants just as positively deposed that Douglass did not abandon but merely temporarily retired to consult Stevenson, his superior officer, intending to return, as he did with Stevenson within an hour or so. The learned Chancellor has seen fit, with, I think, probability at least on his side, to accept the defendants' version, and to hold that there was no abandonment. We certainly ought not to reverse that conclusion.

Upon the other leading question, namely, whether the plaintiff was an "owner" within the meaning of the Assessment Act, I have, after some doubt, come to the conclusion that the judgment appealed against is right in holding that he was an "owner," and not merely a tenant or occupant, and this is, of course, decisive of the action, because, if he was an "owner" his goods and chattels on the assessed premises were liable to seizure for the unpaid taxes whether his name is in the collector's roll or not: R.S.O. 1897, ch. 224, sec. 135, sub-sec. 1 (3).

At first sight the case so much relied on by the plaintiff's counsel of *In re Flatt and Prescott and Russell* (1890), 18 A.R. 1, seems to support the plaintiff's contention. The word, however, there under consideration was "freeholder," not "owner," and the conclusion reached was that the vendee under an agreement to purchase such as the agreement in this case between the loan company and the plaintiff was not a freeholder and therefore disqualified from becoming a petitioner for the incorporation of a village.

The enquiry there was into the status of the petitioner. The statute required that he should be either a legal or an equitable freeholder. If he was one or the other he might join in the petition and thus affect not merely his own interests, but the interests of others by helping to transform what had been rural into urban property by means of the proposed incorporation of what had been farm land into village property. Here the enquiry is who in the circumstances which exist is the taxable owner (for there must always be such a person somewhere after grant from the Crown) of the premises in question. No other property interests are involved and it therefore seems fair to look at the matter as if it were simply

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one between the vendor and the vendee under such an instrument, and looking at it in that way I think the proper conclusion is that for the purposes of taxation the vendee who is in possession under such a contract as the one in question is to be regarded as an owner and liable for the taxes. An additional reason for so holding in the present case is that the plaintiff had agreed with his vendor to pay the taxes.

Several other points were taken by the plaintiff's counsel before us which were doubtless also pressed upon the learned Chancellor unsuccessfully.

It was argued that there was no demand of payment as required by section 134. The fair inference, however, is upon the evidence that such demand was duly made as the learned Chancellor has found. Cogent evidence of the demand is, I think, to be found in the fact that the plaintiff actually paid the first instalment. True, he now says this was paid in his absence by mistake, but it was paid with his money, and we find no evidence that he made any attempt upon his return to have the mistake rectified and the money refunded before this difficulty arose.

Then it is said the time for the return of the roll had expired and the collector was, therefore, *functus officio.* The roll had not in fact been returned, and still at the time of the seizure was in the hands of the collector, who was still collector, and this was long ago determined, properly, we think, to be all that is necessary to entitle him to proceed: *Newberry* v. *Stephens* (1857), 16 U.C.R. 65; *Lewis* v. *Brady* (1889), 17 O.R. 377.

The appeal fails and should be dismissed with costs.

Appeal dismissed.

R. S. C.

[IN CHAMBERS.]

PARRAMORE v. BOSTON MANUFACTURING COMPANY.

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Nov. 4.

Evidence—Discovery—Production—Patent of Invention.

In an action for damages for the infringement of a patent of invention, the defendants pleaded, among other defences, that the invention was in public use prior to the application for letters patent; that the patent was void for want of novelty; that the patent was not at the commencement of the action a valid and subsisting patent; that the plaintiff had not since the expiration of two years from the date of his patent commenced, and after such commencement continuously carried on in Canada the manufacture of the patented invention; that the plaintiff had after the expiration of one year from the granting of the patent imported or caused to be imported into Canada articles made in accordance with the patent:—

Held, that the defendants were entitled to the fullest discovery from the plaintiff, and that he was bound to give information as to agreements and transactions made and carried on between him and certain agents employed by him for the manufacture and sale of the patented invention, especially as to the time at which and the terms upon which the patented invention was manufactured in Canada under the patent; and the plaintiff having refused upon his examination for discovery to answer questions relating to these matters, was ordered to attend for re-examination at his own expense.

The plaintiff was also ordered to make and file another affidavit on production, and to produce for inspection statements received by him from such agents.

A MOTION by the defendants, in an action for the infringement of a patent, for an order compelling the plaintiff to attend for re-examination for discovery and make further production, was argued before the Master in Chambers on the 29th of October, 1902.

G. H. Kilmer, for the defendants.
Bicknell, K.C., for the plaintiff.
W. N. Tilley, for the Kleinert Rubber Company.

November 4. THE MASTER IN CHAMBERS:—This is an action brought by the plaintiff against the defendants for the infringement of a patent for a hose supporter. In their defence the defendants allege:—

(1) The plaintiff's invention has been previously patented to others and had been, previous to the alleged invention by the plaintiff, described in books and printed publications in Canada, and had been previously known or used by others prior to his alleged invention.

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(2) The plaintiff's invention was in public use and on sale for more than one year prior to the plaintiff's application for letters patent in Canada with his consent or allowance as such inventor.

(3) A prior foreign patent for the same invention was granted to the plaintiff more than one year prior to his application for letters patent in Canada.

(4) The plaintiff's said patent is void for want of novelty, lack of patentable invention, and by reason of the plaintiff, as applicant, claiming more than he was entitled to at the time of the alleged invention.

(5) The plaintiff's said patent was not at the commencement of this action and is not now a valid and subsisting patent.

(6) The plaintiff has not since the expiration of two years from the date of his said patent commenced or after such commencement continuously carried on in Canada the construction or manufacture of the patented invention in such manner that any person desiring to use it may obtain it or cause it to be made for him at a reasonable price at some manufactory or establishment for making or constructing it in Canada.

(7) The plaintiff has since the expiration of one year from the granting of his said patent imported or caused to be imported and is now importing or causing to be imported into Canada the invention for which the plaintiff's said patent was granted.

The defendants obtained an order for the examination of the plaintiff for discovery at New York, and during such examination the plaintiff refused to answer certain questions and to produce certain documents. He stated that he is engaged in the manufacture of the hose supporter in question through his agents, The J. B. Kleinert Rubber Company, a corporation organized under the law of West Virginia; that this company manufacture and sell the hose supporter in Toronto, Canada, for him as his agents; that they do not account to him directly but to another agent appointed by him, namely, his wife, who carries on business as R. W. Parramore & Co. He refused to give any information as to the statements rendered by his agents, at first stating that it was not in his power to produce them,

although he subsequently admitted that he thought he could obtain them from his wife; that he has had payments made to R. W. Parramore & Co. of manufacturers in Canada under the license he gave them. He refused to answer what was his agreement with his agents; that he had no power or capacity for ascertaining when manufacturing commenced in Canada, although he adds that he might hunt it up, and that the payments were made to him directly after manufacturing commenced, but he refused to obtain the information to enable him to state when manufacturing commenced in Canada under his patent. He further stated that he was not paying the expenses of this action, that the Kleinert Rubber Company were; that he keeps no books of account himself nor received any statements of royalties in Canada from any one of his agents.

The defendants now move for an order that the plaintiff do file a further and better affidavit on production, and that he do re-attend for examination for discovery and answer the questions which he refused to answer in his said examination for discovery, and for an order that The J. B. Kleinert Rubber Company do make discovery of documents and that the manager of that company in Toronto attend for examination for discovery.

The application for further production and examination of plaintiff is opposed on the ground that the defendants have no right to enquire into the matters in question as it is for the purpose of declaring the plaintiff's patent forfeited under the statute.

In *Hoffman* v. *Postell* (1869), L.R. 4 Ch. 673, Sir George Giffard, in delivering judgment, at p. 681 said: "As regards the case of *Daw* v. *Eley* (1865), 2 H. & M. 725, it must be always remembered that that was the case of a plaintiff exhibiting interrogatories to a defendant, and it was then held that the plaintiff could not call on the defendant to set forth the particulars of his defence. But when you come to the case of a defendant asking questions of a plaintiff, it is a very different thing. It is the defendant's business to destroy the plaintiff's case, and there the defendant has a right to ask all questions which are fairly calculated to shew that the patent is not a good patent, or that what he alleges to be an infringement is not an infringement."

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This is not an action for forfeiture as contended for by counsel for the plaintiff, but it is an action in which the defendants have a right to contend that the rights of the plaintiff have been extinguished on non-performance of the conditions on which he obtained his patent: see the judgment of Cockburn, C.J., in *Pye* v. *Butterfield* (1864), 5 B. & S. 829, at p. 837, where he says: "It is clear, from the decisions in those Courts which have been cited, and the expressions used by eminent text writers, that it is a fixed rule that no bill of discovery will be allowed when the answers may have the effect of causing a forfeiture of estate, except where the estate is held on a conditional limitation, in which case it would be extinguished on non-performance of the condition."

In *Hambrook* v. *Smith* (1852), 17 Sim. 209, Kindersley, V.-C., said, at p. 218: "I am clearly of opinion, therefore, that the objection to discovery on the ground that it might subject the defendant to what he calls forfeiture, but which is only the discovery of the happening of that event on which the estate would determine, is not tenable."

In *Re Haddan's Patent* (1884), 51 L.T.N.S., 190, a petition was presented under section 26 of the Patents, Designs and Trade Marks Act, 1883, to procure the revocation of a patent on six grounds. The statute of 1883 provides that a petition for revocation of a patent may be presented by among others any person alleging that he or any person under or through whom he claims an interest in any trade, business, or manufacture, had publicly manufactured, used, or sold within this realm, before the date of the patent, anything claimed by the patentee as his invention. It was held by Mr. Justice Kay that the petitioner was entitled to exhibit interrogatories to the defendant to support the petition. He said: "No doubt the practice is, if the Court thinks fit to give leave, to allow the petitioner, on the application for the revocation of a patent, to exhibit interrogatories to the opposite party."

Even if the present case was one for a forfeiture the plaintiff should have taken that objection on his examination. The counsel attending for him on that examination files an affidavit of his own taking this objection, but that is not sufficient; the plaintiff should make the affidavit himself, if it were a proper

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case in which to make one. I am of opinion that the defendants are entitled to the fullest discovery from the plaintiff. That has been so far withheld from them. The plaintiff must attend at his own expense and submit to be examined on the issues raised in the pleadings, and also file a further and better affidavit on production. His agents have statements which he should produce. As to his obtaining all information necessary to give the fullest discovery I would refer to *Bolckow* v. *Fisher* (1882), 10 Q.B.D. 161, and *Leitch* v. *Grand Trunk R.W. Co.* (1898), 13 P.R. 369, at p. 373. The costs of this part of the application will be to the defendants in any event. With reference to the application against the Kleinert Rubber Company, it will stand until after the examination of the plaintiff is concluded.

R. S. C.

[DIVISIONAL COURT.]

D. C.
1902

June 30.
Oct. 15.

RE SCADDING.

Will—Construction—Legacies—Interest.

A will directed that the estate, real and personal, should be sold and that the executors should hold the proceeds in trust to pay an annuity of $800, and then to pay all the residue of the income to the testator's widow for life, and on her death to divide the corpus, paying to two grandchildren $1,000 each, and dividing the residue amongst the testator's children. The will declared that the two legacies to the grandchildren were subject to the widow's life interest, and directed that they should be paid when the grandchildren should attain twenty-one, but in case the estate would be divided before they attained that age, interest should be paid on their legacies. If the grandchildren died before attaining twenty-one, the legacies were to fall into the estate. Both the grandchildren attained twenty-one before the death of the widow:—

Held, that interest on the legacies should be paid by the estate only from the death of the widow.

Toomey v. *Tracey* (1883), 4 O.R. 708, distinguished.

Decision of MacMahon, J., reversed.

MOTION upon an originating notice under Rule 938 for a summary order determining the question whether interest was payable on the legacies bequeathed to Frederick Mitchell Scadding and Charlotte Millicent Scadding by the will of Charles Scadding, deceased, from the time of their respectively attaining the age of twenty-one years, and directing that the executors of the will should pay to Mary Ann Scadding interest from the 19th June, 1902, on the legacy of Frederick Mitchell Scadding (assigned to Mary Ann Scadding by instrument bearing date the 26th December, 1896), and should pay to Charlotte Millicent Scadding interest from the 29th December, 1896, on the legacy to her. The facts are stated in the judgments.

The motion was heard by MACMAHON, J., in Chambers, on the 23rd June, 1902.

W. Bell, for Mary Ann Scadding and Charlotte Millicent Scadding, the applicants.

C. A. Masten, for the executors.

June 30. MACMAHON, J.:—By the will of the testator, Charles Scadding, all his estate, real and personal, is devised and bequeathed to the executors therein named upon the trusts

mentioned therein. They are to sell and dispose of all the testator's real and personal property and convert the same into money, excepting the securities for money and such articles of household furniture as his wife, Jane Scadding, may select, which are to become hers absolutely. All the moneys coming into the hands of the trustees are to be invested in such securities as they shall deem best.

The will then provides that "out of the rents, dividends, and annual proceeds and interest of my said estate I direct that the trustees of this my will shall first deduct and pay unto Amelia Coates, widow of William Coates, late of the city of Toronto, deceased, the sum of eight hundred dollars annually and at the times and in the manner set forth in the condition of a certain bond made by me to the said Amelia Coates (under her then name of Amelia Scadding) and dated on or about the 30th December, A.D. 1856, and shall pay the balance of the said interest, dividends, and annual proceeds of my said estate unto my said wife Jane Scadding during the term of her natural life for her own use and benefit and for the support in her discretion of my daughter Sophia Martin during my said wife's lifetime and so long as my said daughter shall live with her. Upon the decease of my said wife I direct the trustees or trustee for the time being of this my will to divide all my estate amongst my children Henry Simcoe, Edward Ashenden, Charles, and Sophia, in manner hereinafter provided, share and share alike, and if any of them shall have died before the decease of my said wife, leaving lawful issue, then such issue shall stand in the place of and be entitled to the share of the deceased parent."

"Subject to the aforesaid life interest payable to my wife, I give, devise, and bequeath to my grandchildren Frederick Mitchell Scadding and Charlotte Millicent Scadding the sum of one thousand dollars each, to be paid to each on their respectively attaining the age of twenty-one years, and in case my estate is divided before they reach that age, the principal is to be invested and the interest thereon is to be paid to their mother for them annually, in the discretion of my executors. In case either of my said last-mentioned grandchildren shall die before he or she attains the age of twenty-one years, the

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said sum so bequeathed to the one so dying is to revert to my estate."

The testator died on the 19th June, 1892, and his widow, Jane Scadding, died on the 10th January, 1902.

Frederick Mitchell Scadding was of the full age of twenty-one years on the 22nd April, 1891, and assigned the legacy payable to him under said will to his mother, Mary Ann Scadding, on the 26th December, 1896. And Charlotte Millicent Scadding was twenty-one years old on the 29th December, 1896.

The executors are three of the residuary legatees under the will, and they have paid to the claimants, Mary Ann Scadding and Charlotte Millicent Scalding, the said legacies and interest thereon from the date of the death of Jane Scadding to the date of payment.

Amelia Coates, who is entitled to an annuity or yearly legacy of $800, is still alive and over 90 years old.

The first charge on the mixed fund created by the direction in the will to sell the real and personal estate is the payment of the annuity to Amelia Coates, and, subject to such payment, the whole balance of the interest, dividends, and annual proceeds of the estate is directed to be paid to the testator's widow during her life. This fund, from which the income payable to the widow is derived, is not to be depleted by the payment during her lifetime of the legacies to Frederick Mitchell Scadding and Charlotte Millicent Scadding. So that, although the legacies became vested in each of the legatees on their respectively attaining the age of twenty-one years, payment is postponed until the death of the widow, there being no fund out of which to pay until that event happened.

Now, although from the very terms of the will the payment of the legacies is necessarily postponed until the death of the widow, it is, I think, clear that the legatees are entitled to interest from the time they respectively reach twenty-one. These are general legacies, and the time of payment has been fixed by the testator. And in Williams on Executors, 9th ed., p. 1290, the rule as to interest in such cases is thus stated: "With respect to interest on general legacies, where the time of payment is fixed by the testator: The general rule is, that the

legacies will carry interest before the arrival of the appointed period; as for instance, when the legatees shall attain twenty-one: *Heath* v. *Perry* (1744), 3 Atk. 101; *Tyrrell* v. *Tyrrell* (1798), 4 Ves. 1. Nor will it make any difference that the legacy is vested."

In *Toomey* v. *Tracey* (1883), 4 O.R. 708, the testator by his will directed his executors to sell his personal property for payments of his debts, and, if found insufficient, to sell so much of his real estate as would supply the deficiency, and went on to direct that his land should be sold and the income of the capital arising from the sale thereof should, subject to the payment of his debts, be paid yearly to his wife for her maintenance during her natural life, after which he gave a number of pecuniary legacies, but made no residuary gift. On a special case stated for the opinion of the Court, Proudfoot, J., held that the testator had created a mixed fund to answer the purposes of his will, and that interest was payable on the legacies from a year after the testator's death, in accordance with the general rule, in any event; and this although, as the whole interest of the proceeds of the land was given to the wife for life, the capital had to be kept invested by the executors, and consequently there was no fund for the payment of legacies until her death.

In *Lord* v. *Lord* (1867), L.R. 2 Ch. 782, Lord Cairns, L.J., at p. 789, said: "The rule of law is clear, and there can be no controversy in regard to it, that a legacy payable at a future day carries interest only from the time fixed for its payment. On the other hand, where no time for payment is fixed, the legacy is payable at, and therefore bears interest from, the end of the year after the testator's death, even though it be expressly made payable out of a particular fund which is not got in until after a longer interval."

The present case is not distinguishable from *Toomey* v. *Tracey* (supra), and there must be judgment declaring that Mary Ann Scadding, as the assignee of Frederick Mitchell Scadding, is entitled to be paid by the executors interest on the legacy payable to him from the 22nd April, 1891, until the death of the testator's widow; and also declaring that Charlotte Millicent Scadding is entitled to be paid by said executors, on

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the legacy payable to her under the terms of the said will, interest from the 29th December, 1896, until the date of the death of testator's widow.

The costs of all parties will be payable out of the estate.

The executors appealed from this order, and their appeal was heard by a Divisional Court composed of BOYD, C., STREET and MEREDITH, JJ., on the 13th October, 1902.

Masten, for the executors. The testator has in the will mentioned two different dates for payment of these legacies, viz., at the death of the widow, and when the legatees attain twenty-one. The questions which of these two dates governs and whether these legacies are actually payable when the estate is distributable or at the time when the legatees come of age, depend upon the construction of the will, and a consideration of its various terms and provisions shews that the governing provision is, that the estate shall be conserved as a whole until the death of the widow. These are general legacies, the time for payment of which is fixed by the will. While it is true that specific and demonstrative legacies carry interest from the date of the death of the testator, and also that general legacies carry interest from a year from the death of the testator, when no time of payment is fixed, yet, when a time of payment is fixed, interest does not run until that time arrives: Williams on Executors, 9th ed., pp. 1286, 1288, 1290. The period for which interest runs is the same as the time from which the Statute of Limitations begins to run: *Earle* v. *Bellingham* (1857), 24 Beav. 448; *Holmes* v. *Crispe* (1849), 18 L. J. Ch. 439. The scheme of the will is to convert the whole estate and trust fund, and with respect to this fund successive trusts arise. No interest can accrue until the trust for payment of this particular legacy has arisen: *Lord* v. *Lord*, L. R. 2 Ch. 782. *Toomey* v. *Tracey*, 4 O.R. 708, is to be distinguished on the ground that no time was there fixed for payment of the legacies, and that action could therefore have been brought for recovery of such legacies one year after the death of the testator, and, if the personal estate had been sufficient, the legacies could have been realized at any time, and therefore the legacies were given simpliciter and no trust with

respect to them existed. See also the following cases: *Milltown* v. *Trench* (1837), 4 Cl. & F. 276; *Heath* v. *Perry*, 3 Atk. 101; *Tyrrell* v. *Tyrrell*, 4 Ves. 1; *Crickett* v. *Dolby* (1795), 3 Ves. 10; *Festing* v. *Allen* (1842), 5 Hare 573; *Palmer* v. *Trevor* (1684), 1 Vern 261; *Re Robinson* (1892), 22 O.R. 438.

Bell, for the respondents, the original applicants. *Lord* v. *Lord*, L.R. 2 Ch. 782, supports the contention that interest is payable from the time the legatees attained twenty-one, as also does *Toomey* v. *Tracey*, 4 O.R. 708. See also *Turner* v. *Buck* (1874), L.R. 18 Eq. 301; *Freeman* v. *Simpson* (1833), 6 Sim. 75; Williams on Executors, 9th ed., p. 1290. Where a testator names a time, there is an additional reason for allowing interest from that time: *Wood* v. *Penoyre* (1807), 13 Ves. 325*a*. The postponement of the payment does not prevent interest running.

Masten, in reply. The cases cited for the legatees are to be distinguished on the ground that in all of them no time was fixed for payment of the legacy, which, therefore, became enforceable one year after the testator's death.

October 15. BOYD, C.:—The scheme of the will is to create a trust fund of the whole estate, real and personal, to be held by the trustees and executors to pay first of all an annuity of $800, and then to pay all the balance of the income to the testator's widow for life, and on her death to divide the corpus of the estate; to the two grandchildren $1,000 each; and then in equal division amongst the testator's children.

The bequest of these two legacies is declared to be subject to the widow's life interest; the legacies are to be paid when the grandchildren attain twenty-one, but in case the estate is divided (*i.e.*, upon the death of the widow) before they attain twenty-one, then interest is to be paid on the legacies; if the grandchildren die before attaining twenty-one, the legacies fall into the estate.

The meaning of this clause is, that the legacies are made contingent upon the beneficiaries coming of age, when they become vested, but the time of payment is postponed till the

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widow dies. They have attained twenty-one, and the widow did not die till some years thereafter.

The payment of interest on legacies depends upon certain rules which are modified by the intentions of the testator, as expressly or impliedly declared by the language of the will. This will is not silent as to interest; it contemplates and provides for the payment of interest on the legacies after the time fixed for dividing the estate, if the legatees are not then of age. That indicates to my mind that interest is not meant to be given before the time arrives for dividing the estate. It is a general rule that interest is not payable on a legacy, whether vested or not, until it is actually due and payable; interest is given for delay in payment. The testator has here in effect declared that the legacies are not to be paid till the death of the widow. If that falls after the beneficiaries attain twenty-one, as in this case, it does not follow that interest should be given in the interval—for the time has not arrived which the testator has fixed for payment, and there is no default in non-payment. Interest is not to be exacted when by the direction of the testator there is nothing in hand to pay the legacy.

Toomey v *Tracey*, 4 O. R. 708, is distinguishable in this, that the legacy there was presently payable, and could have been sued for at the end of the year allowed for administration. Here no action could be brought till the death of the widow.

For these reasons, I think the judgment should be changed and declare that interest on legacies runs only from the death of the widow: see *Crickett* v. *Dolby*, 3 Ves. 10.

Costs out of the estate.

Street, J., concurred.

Meredith, J.:—The meaning of the will is, that, in the events which have happened, the legacies in question became payable at the widow's death, not upon the legatees respectively attaining full age.

The scheme of the testator, as developed in his will, was that the proceeds of the estate should remain intact until his wife's death, so that she might have the benefit of the whole

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income from it, over the $800 annuity; and that, at her death, the legacies in question should go to the grandchildren, to be paid to them as they attained majority, and all were put upon an equality by the express provision that interest should be paid to those whose payments should be deferred by reason of their minority.

The fact that one of the legatees attained full age in the testator's lifetime goes to confirm this reading of the will.

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[DIVISIONAL COURT.]

RE RITZ AND VILLAGE OF NEW HAMBURG.

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Sept. 10.
Oct. 22.

Municipal Corporations — Application to Quash By-law—Countermand — Substitution of Another Ratepayer.

A summary application to quash a municipal by-law was made at the instance and upon the behalf of nine interested ratepayers, who combined to make the necessary deposit, and put forward as applicant one of their number, who duly launched the application, but afterwards gave the respondents notice of discontinuing it. After the three months allowed by the Municipal Act for making such an application had expired, the application not, however, having been dismissed, one of the remaining ratepayers applied to be added or substituted as an applicant :—

Held, that he should be allowed to continue the proceedings in the original applicant's name, on the usual terms of indemnifying him against costs.

MOTION by John F. Katzenmeier for an order allowing him to be added as an applicant upon a pending motion to quash by-law number 259 of the village of New Hamburg, or substituting Katzenmeier for the original applicant, Charles Ritz.

On a petition signed by more than two-thirds of the ratepayers, the council of the village was empowered by 2 Edw. VII. ch. 52 to pass a by-law authorizing the municipal corporation of the village to grant a bonus to the New Hamburg Manufacturing Company, not exceeding $10,000, and to issue debentures for an amount not exceeding $10,000, payable during a period not exceeding twenty years.

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A by-law was passed by the council in May, 1902, granting such bonus and authorizing the issue of debentures for that sum and interest thereon.

Ritz, on the 15th August, gave notice of motion to quash the by-law, on various grounds appearing in the notice.

On the 26th August Ritz served on the village corporation a notice countermanding the notice of motion to quash; when the countermand was served, the time for making a fresh application to quash had expired. (R.S.O. 1897, ch. 223, sec. 380).

Katzenmeier had on the 22nd August issued a writ against the village corporation, on which was indorsed a claim for an injunction to restrain the village from paying over the $10,000 to the New Hamburg Manufacturing Company, but no motion was made for an injunction. And on the present motion he filed a consent to his name being substituted for that of the applicant, Charles Ritz, or to his name being added as one of the applicants to the motion to quash made by Ritz.

The application was heard by MACMAHON, J., in Chambers, on the 9th September, 1902.

E. E. A. DuVernet, for the applicant.

A. B. Aylesworth, K.C., for the village corporation.

September 10. MACMAHON, J. (after setting out the facts as above):—The control of the proceedings to quash the by-law rested with Ritz, and when he served notice of countermand on the village corporation, the proceedings on his application came to an end. And what the applicant asks is to have his name substituted as an applicant on the motion to quash, when the original applicant has put an end to the proceeding by his notice of countermand.

The authority relied upon by Mr. DuVernet, *McPherson* v. *Gedge* (1883), 4 O.R. 246, does not support his claim to the order. That was an action under the Mechanics' Lien Act (R.S.O. 1877, ch. 120), sec. 15 of which provided that suits brought by a lienholder shall be taken to be brought on behalf of all lienholders of the same class; and the Court held that upon the death of a lienholder who had brought a suit, or his

refusal or neglect to proceed, the suit might by leave of the Court be prosecuted by any lienholder of the same class. There the statute gives express power to the Court to allow a lienholder, under certain circumstances, to intervene and become a party to the suit. And the statute (R.S.O. 1897, ch. 223, sec. 231) in case of *quo warranto* proceedings permits a new relator to intervene and prosecute. So also where a creditor brings an action on behalf of himself and all other creditors to set aside as fraudulent a conveyance made by his debtor, there, in the event of the plaintiff declining to prosecute the action, another creditor would, on application, be allowed by the Court to intervene (on proper terms as to costs), as the action had been framed so as to include such other creditor And had Ritz in his notice of motion to quash alleged that he was acting not only for himself but for all other ratepayers interested in quashing the by-law, if Ritz refused to proceed with the motion, the Court would, on an application by one of the other ratepayers interested, have permitted him to be joined in the notice of motion as one of the class referred to therein.

Katzenmeier does not even allege that he was one of those who induced Ritz to institute the proceedings to quash.

There is no authority to make the order asked for, and the motion must be dismissed with costs.

Katzenmeier appealed to a Divisional Court from the above decision, and his appeal was heard (upon new material referred to in the judgments below) by BOYD, C., STREET and MEREDITH, JJ., on the 13th October, 1902.

The same counsel appeared.

October 22. BOYD, C.:—The analogy of proceedings in an action applies to these applications to quash by-laws: *Re Sweetman and Township of Gosfield* (1889), 13 P.R. 293, approved of by the Court of Appeal in *Re Shaw and City of St. Thomas* (1899), 18 P.R. 454.

When the fact is that the motion to quash is taken on behalf of a number of interested ratepayers who have combined to make the necessary deposit to answer costs, it is as a matter of course to allow any amendment of the papers so as to place

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that fact on record: *In re Tottenham*, [1896] 1 Ch. 628. And if it be the fact that the motion is in truth on behalf of a number so interested, the failure of the individual put forward to give a title to the proceedings to prosecute, or his attempt to relinquish the proceedings, should not prejudice the others who seek to have the matter adjudicated. In such a case the practice of the Court is to substitute another, being one of those really interested: *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K.B. 485.

The persons interested, who contributed the money, relied upon their nominee, Ritz, duly prosecuting the motion intrusted to him, and if he betrays that trust, the Court seised of the motion is not helpless to do justice in the premises.

True, in a creditor's suit the creditor who files a bill may before decree dismiss it and another creditor is not allowed to intervene, because he does not rely on the diligence of the acting creditor, and it is open for him to begin proceedings in his own name. But the points of difference here are plain: because it is too late to initiate another motion, on account of the three months' limit; and because all the contributories relied upon Ritz acting promptly and uprightly. See *Handford* v. *Storie* (1825), 2 Sim. & Stu. 196, at p. 198; *Canadian Bank of Commerce* v. *Tinning* (1893), 15 P.R. 401; *Atlas Bank* v. *Nahant Bank* (1839), 23 Pick. 492; and because those thus defrauded have made actual contribution to the expenses of the litigation.

The present situation involves the determination of what was considered by Mr. Justice Moss in *Macdonald* v. *City of Toronto* (1897), 18 P.R. 17, 19, where he says: "If it were made to appear that the plaintiff was acting in collusion with the defendants to drop the further prosecution of the action, and that the result would be a serious detriment or prejudice to the other ratepayers, respondents in the proceeding, the Court might see its way to intervene, and by substituting another plaintiff prevent the carrying out of such a design."

I think the statement of the difficulty suggests its solution in the manner proposed, and that the Court should grant the relief asked.

These contributories to the fund may be rightly regarded as *cestuis que trust*, and as *quasi* parties, one of whom might be allowed to prosecute the attack upon the by-law, while yet the proceedings were pending and the nominal plaintiff was being bought off by the adversary.

The terms will be as stated by my brother Meredith.

MEREDITH, J.:—The application was made at the instigation, and upon the behalf, of nine ratepayers. Ritz was but one of them, and, with his concurrence, his name only was used in the proceedings. Some time afterwards, he was bribed to discontinue them, and desired to do so, and has done all he was asked to do, by those who bribed him, to carry out his corrupt bargain; but the application was still pending when the order appealed against was made.

In these circumstances, the Court is not powerless to prevent the bribed defeat of the ratepayers' right to apply to quash the by-law. Ritz, as their agent, could be restrained from such a breach of confidence and trust. A simple and ready injunction is the order proposed: see *Payne* v. *Roger* (1780), Doug. 407; *Legh* v. *Legh* (1799), 1 B. & P. 447; *Doe* v. *Franklin* (1816), 7 Taunt. 9; *Hickey* v. *Burt* (1816), *ib.* 48; *Mountstephen* v. *Brooke* (1819), 1 Chit. 390; *Innell* v. *Newman* (1821), 4 B. & Ald. 419. They may, and ought to, be empowered to continue the proceedings in Ritz's name, on the usual terms of indemnifying him against costs. They should also undertake to speed the hearing of the application, and should, at the end of the litigation, pay the respondents' costs of the motion below and of this appeal, which, by reason of the new material used, puts it, for the purpose and in the circumstances of the case, in the same position as an original motion.

STREET, J.:—I concur.

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[DIVISIONAL COURT.]

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Oct. 22.

PEOPLE'S BUILDING AND LOAN ASSOCIATION v. STANLEY.

Execution—Judge's Order for Costs—Direction for Set-off—Service of Allocatur—Issue of Execution—Production of Order.

Where a Judge's order requires the defendant to pay interlocutory costs to the plaintiffs, and the Judge makes an oral direction that costs previously awarded to the defendant should be set off *pro tanto*, the deduction should be made before execution issues on the Judge's order.

It is not necessary to serve the certificate of taxation of the costs awarded by an order, where the party to pay has been represented upon the taxation and has notice of the amount payable.

When execution is issued upon a Judge's order, the order itself or an office copy should be produced to the officer issuing it; a mere copy is not sufficient, unless such officer is the one who has official custody of or access to the book in which the order is entered.

APPEAL by the defendant from an order of Lount, J., in Chambers, dismissing the defendant's application to set aside a writ of *fi. fa.* against the defendant's goods for interlocutory costs under a Judge's order, upon grounds of irregularity appearing below.

The appeal was heard by a Divisional Court composed of BOYD, C., STREET and MEREDITH, JJ., on the 14th October, 1902.

W. H. Bartram, for the defendant.

D. W. Saunders, for the plaintiffs.

October 22. BOYD, C.:—Strict practice requires that when execution is issued upon a Judge's order, the order itself or an office copy thereof should be produced to the officer, unless that officer has official custody of the books of the Court wherein the order has been entered. In such case he may act upon the copy of the order served, after verifying its correctness by reference to the record in his custody. Where the officers are distinct, *i.e.*, one officer issues the order and another issues the execution, then proper evidence of the existence and contents of the order should be laid before the officer who issues process. It is customary in the central office at Osgoode Hall, where all the officers are together, that one should refer to the other, and a copy of an order served may be acted upon when

the officer has the means at hand of verifying its correctness. So in the Weekly Court at London, where an order is issued and entered by the clerk at the weekly sittings, it is competent for the auxiliary officer who issues execution thereon, *i.e.*, the deputy registrar, who is in easy touch with the other officer, to satisfy himself that the copy served is accurate. In the absence of evidence and in face of the fact that it is not disputed that the copy is right, the Court on this motion will infer that *omnia rite esse acta.*

I think that the appellant has a right to complain in strictness that deduction was not made from the costs last taxed against him, if the company's solicitor intended to issue execution therefor, and for this reason I would agree with the result arrived at by my brother Meredith.

STREET, J.:—I concur.

MEREDITH, J.:—The appellant seeks to set aside the *fi. fa.* on these grounds: 1, because costs directed to be set off were not deducted before the writ issued; 2, because the certificate of taxation was not served; 3, because. as to part of the costs included in the writ, it was issued without production of the original order for payment of such costs.

As to the first ground, the direction was an oral one, made by the learned Judge who made the order now in appeal, so that it must have been considered by him that his oral direction had been substantially carried out, and so it now appears. The costs have been set off against an earlier bill of the plaintiffs, upon which execution had issued. The only possible loss the defendant could sustain by setting his costs off against the plaintiffs' earlier instead of later bill is the sheriff's poundage on $12, that is, 72 cents, and in the disposition to be made of this motion that will be prevented.

As to the second ground, there is no practice requiring service of the allocatur in such a case as this. The defendant's solicitor had notice of the taxation, and his agents were present when it was completed, so that the defendant had notice of the amount payable, and the writ was not issued until five days afterwards: see Con. Rule 843. It would have been more

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courteous and commendable to have asked for payment before issuing the writ; the amount was small, for interlocutory costs only, and the solicitors resided in the same town, and after the previous like taxation a copy of the allocatur had been served; though, to the contrary, it is right to add that such service had no effect, the costs were not paid, the writ had to be issued to recover them.

The last ground seems more important as a matter of general practice. It can hardly be good practice to issue execution upon what at most merely purports to be a copy of an order; and, in this case, there was no reason why the original or an office copy could not readily have been obtained. Our Rules seem to contain no provision touching the question; they are quite bald as to the *modus operandi* in obtaining the writ; they indicate from which office such writs shall issue, and provide for the filing of a præcipe, but that seems to be all. The English Rules expressly require the production of the original order or of an office copy of it: O. 42, r. 11: and such has long been the practice there, a Rule of 1853 providing that no writ of execution should be issued until the judgment paper, postea, or inquisition, as the case might be, had been seen by the proper officer: R. 71, H.T. 1853. This is a reasonable and convenient practice, which ought to be followed—as I think it has been—in this Court. It might be different if the order were entered in a book accessible to, and examined by, the officer issuing the writ, before issuing it. But the defendant has not suffered from the irregularity; the order existed, and an office copy of it could have been had.

In these circumstances, the proper order to be now made, is that, upon the defendant paying to the plaintiffs or the sheriff, within five days, the amount due upon the two later bills of costs, that is, the balance now payable for interlocutory costs, all proceedings upon the writ be stayed. No costs of this appeal or the motion below; in default, the appeal to be dismissed with costs.

T. T. R.

[IN CHAMBERS.]

RE LENNOX PROVINCIAL ELECTION.

PERRY ET AL. v. CARSCALLEN.

1902
Nov. 10.

Parliament—Controverted Election Petition—Affidavit of Petitioners' Bona Fides—Commissioner—Qualification—Agent for Solicitor.

The respondent to a petition under the Ontario Controverted Elections Act moved to set aside or dismiss the petition and to set aside the service thereof and of the affidavit of *bona fides* and of notice of presentation, because the commissioner before whom the affidavit was sworn was the solicitor by whom the petition and affidavit were prepared, and by whom, as agent for the petitioners' solicitors, the petition was presented :—

Held, that the commissioner was not disqualified.

MOTION by the respondent to set aside or dismiss the petition and to set aside the service thereof and of the affidavit of *bona fides* and of notice of presentation upon the respondent. The facts are stated in the judgment.

The motion was heard by OSLER, J.A., in Chambers, on the 8th November, 1902.

C. A. Masten, for the respondent.

R. A. Grant, for the petitioners.

November 10. OSLER, J.A.:—The objection to the proceedings appears to be that the commissioner before whom the petitioners' affidavit of *bona fides* was sworn, was disqualified, he being the solicitor by whom the petition and affidavit were prepared or filled up, and by whom, as agent for the petitioners' solicitors, the petition, as appears by the indorsement thereon, was presented.

The affidavits shew that Messrs. Kerr, Davidson, Paterson, & Grant were instructed to present a petition against the election; that they sent one Sutherland, a clerk in their office, to Napanee with the necessary forms of petition and affidavit to be signed and sworn to by the petitioners, whoever these might turn out to be; that he went to the office of Mr. German, a local solicitor, who filled up the forms and as commissioner swore the petitioners to the affidavit; that Sutherland took the papers back with him to his principals,

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RE LENNOX PROVINCIAL ELECTION.

who, after indorsing the petition as follows, "This petition is presented by T. B. German, of the town of Napanee, in the county of Lennox and Addington, agents for Messrs. Kerr, Davidson, Paterson, & Grant, of the city of Toronto, solicitors for the petitioners," returned it to German, who filed it with the local registrar at Napanee on the 2nd August, 1902, together with the affidavit and notice of presentation, which latter appears to be filled up in German's handwriting. Copies of all these proceedings were afterwards served upon the respondent.

A solicitor was not, nor was his clerk, partner, or agent, under any disability at common law which disqualified them from swearing any one to an affidavit in a cause in which the former was the solicitor on the record. A clear rule or settled practice creating such disqualification in the case before me must be shewn to entitle the applicant to succeed.

If Con. Rule 522 applies to the proceedings in an election petition, it does not help the respondent, as it extends only to affidavits sworn before the solicitor of a party to the cause or his clerk or partner.

The Rules of Court touching controverted elections make no provision in the subject, and sec. 113 of the Ontario Controverted Elections Act, R.S.O. 1897, ch. 11, provides that, so far as these Rules do not extend, the principles, practice, and rules on which election petitions touching the election of members to the House of Commons of England, were on the 15th February, 1871, dealt with, shall be observed.

I am referred to nothing under this head which touches the point.

Then it is said that, in the absence of any Rule or decision, the principle of certain decisions in equity ought to be applied, and the agent of the solicitor in the cause who prepared the papers ought to be held to be within the mischief which is struck at. *Foster* v. *Harvey* (1863), 11 W.R. 899; *S.C.*, in appeal (1863), 9 L.T. N.S. 404; *Duke of Northumberland* v. *Todd* (1878), 7 Ch. D. 777; and *In re Gregg* (1869), L.R. 9 Eq. 137, 143: were cited.

It is not suggested that any actual impropriety has occurred or that any wrong or injustice has been done. The

objection is, therefore, a strictly technical one, and, if we are to look for analogy or principle, I see not why we should go beyond our own Rule of Court, which does not include an agent.

Further reason for holding that the objection fails, even had the affidavits been sworn before one of the members of the firm who now appear to be the petitioners' solicitors, is, that when the affidavits were sworn there was no cause or matter in Court, and therefore no solicitor on the record.

In this respect the case is like *Regina ex rel. Blaisdell* v. *Rochester* (1855), 12 U.C.R. 630. There, the relator's attorney took the recognizance and affidavit on which the County Judge acted in granting the fiat for a municipal summons. The Court said, *per* Draper, J., that no rule or practice governed the point, and, even if they doubted the strict regularity of the proceeding, on the ground of the commissioner being also the attorney, they would be slow to interfere unless a very strong necessity for so doing was made out. The case was compared to that of the suing out of a *capias* on an affidavit taken before a commissioner who afterwards acted as plaintiff's attorney in suing out the writ.

On every ground the objection fails, and the motion is dismissed, with costs to be taxed and added to the petitioners' general costs of the cause or paid to the petitioners in any event.

T. T. R.

[DIVISIONAL COURT.]

D. C.
1902
Oct. 9.

MILLIGAN v. JAMIESON.

Defamation—Slander—Verdict for Defendant Notwithstanding Proof of Defamatory Words — New Trial — Aggravation of Damages — Evidence — Pleading.

In an action for slander a jury is not bound to return a verdict for the plaintiff even though the defamatory words be proved, and a new trial will not be granted because in such a case they have returned a verdict for the defendant.

New trial refused, notwithstanding rejection of evidence tendered in aggravation of damages where the plaintiffs' pleading contained no allegations entitling him to give such evidence.

THIS was a motion for a new trial in an action for slander, upon the grounds mentioned in the judgment. The motion was argued on October 7th, 1902, before MEREDITH, C.J.C.P., and MACMAHON and LOUNT, JJ.

W. R. Riddell, K.C., and *W. M. German*, K.C., for the plaintiff, contended that where there is no doubt of the publication of the defamatory words and of their applicability to the plaintiff, the jury cannot find a verdict for the defendant, and there should be a new trial: *Hakewell* v. *Ingram* (1854), 2 C.L. 1397; *Maclaren* v. *Davis* (1890), 6 Times L.R. 372; *Moore* v. *Mitchell* (1886), 11 O.R. 21; *Wood* v. *Cox* (1889), 5 Times L.R. 272; *Peters* v. *Wallace* (1855), 5 C.P. 238; *Thomas* v. *Williams* (1880), 14 Ch. D. 864; *O'Brien* v. *Marquis of Salisbury* (1889), 6 Times L.R. 133, at p. 137; Folkard's Law of Slander and Libel, 6th ed., at p. 562; Odgers Law of Libel, 3rd ed., pp. 111, 614; that it had never been the function of a jury to say whether a spoken word was a slander or not, and they cannot say that words purely and clearly defamatory are not so; that the evidence in aggravation of damages should have been admitted: *Praed* v. *Graham* (1889), 24 Q.B.D. 53; *Darby* v. *Ouseley* (1856), 1 H. & N. 1, 13; *Pearson* v. *Lemaitre* (1843), 5 M. & Gr. 700.

A. B. Aylesworth, K.C., for the defendant, contended that a jury could not be compelled to give nominal damages; that here what the jury virtually said was "We find no damages for the plaintiff, and find a verdict for the defendant;" and they were entitled to do so: *Wills* v. *Carman* (1888), 14 A.R.

656, 666; *Lemay* v. *Chamberlain* (1886), 10 O.R. 638; *Wisden* v. *Brown* (1885), 1 Times L.R. 412; that the Court was not compelled to grant a new trial merely for the sake of nominal damages: *Arscott* v. *Lilley* (1887), 14 A.R. 283, 287; *Cooke* v. *Brogden & Co.* (1885), 1 Times L.R. 497; that actions for slanders are actions in which the Court very rarely grants a new trial: *Smith* v. *Brampston* (1795), 2 Salkeld, 644; Odger on the Law of Libel, 2nd ed. at p. 582; that the only case exactly like this seemed to be *Arscott* v. *Lilley*; that the jury could not be forced to put the defendant in the position of having to pay the costs; that libel was a different and graver offence than slander. As to the rejection of the evidence, he cited Odgers Law of Libel, 2nd ed., pp. 293, 309, 320; *Scott* v. *Sampson* (1882), 8 Q.B.D. 491.

Riddell, in reply, contended that *Lemay* v. *Chamberlain* had been overruled, citing *Wills* v. *Carman*, 14 A.R. 656, at p. 667; and contended that in *Arscott* v. *Lilley*, 11 O.R. 153, 285, 14 A.R. 283, the reason for the Court not interfering was that they could not find the plaintiff was entitled to nominal damages; he also referred to Folkard's Law of Slander and Libel, 6th ed. at p. 361.

October 9. The judgment of the Court was delivered by MEREDITH, C.J.:—The appellant's action is for slander. The jury found for the defendant upon the ground that the plaintiff had sustained no damage, for that is manifestly the meaning of their finding.

Mr. Riddell, for the appellant, moved for a new trial upon the ground that the verdict was perverse, that the slander was proved, and, in fact, admitted, and that the jury should have found for the appellant with at least nominal damages.

It is, I think, made out that the use by the respondent of the defamatory words was proved and admitted by the defendant; but granting this, *Simonds* v. *Chesley* (1891), 20 S.C.R. 174, and *Scammell* v. *Clarke* (1894), 23 S.C.R. 307, establish that ordinarily where a verdict has passed for the defendant when it should have been for the plaintiff for nominal damages, the Court will not send the case down for another trial. In other words, that a new trial will not be granted to enable the plaintiff to obtain nominal damages.

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The actions in these cases were, no doubt, on contract, and the most that the plaintiff could have recovered was nominal damages, but I think the principle of the decisions applies here. All that the jury ought to have done, having come to the conclusion at which they arrived, was, putting the case most strongly for the appellant, to have found a verdict for him for nominal damages.

They did not find for the plaintiff, but they found for the defendant, and, I think, applying the principle of the cases referred to, we should not send the case down for a second trial in order that the damages which the jury ought to have assessed should be assessed to the appellant.

We have no power to alter the verdict, and the result, therefore, is that upon this branch of the case the appellant fails.

Mr. Riddell also objected that the learned Judge refused to admit evidence which was offered for the appellant, and was directed to aggravating the damages.

It is not quite clear, I think, that there was a rejection of any such evidence, but even if there had been, there was no allegation in the pleading which entitled the appellant to give evidence of other acts of the defendant which would tend to aggravate the damages.

It was incumbent on the plaintiff, we think, if he intended to adduce evidence of acts of the respondent on which he relied for aggravating the damages, to have set forth the acts relied on in his pleading, and this was not done.

According to our system of pleading, the material facts upon which the pleader relies must be set forth in his pleading.

It would be a highly inconvenient practice to require a defendant to go to trial at the risk of being met with a number of circumstances which the other side was permitted to give evidence of without setting them forth in his pleading, and which might, if unanswered, seriously affect the damages.

We think the learned Judge, if he did reject such evidence, was right in doing so.

The result is that the motion must be dismissed, but we think that under all the circumstances of the case, the dismissal should be without costs.

A. H. F. L.

[IN THE COURT OF APPEAL.]

SMITH ET AL. V. HUNT ET AL.

C. A.
1902
Sept. 19.

Mortgage—Pretended Sale Under Power—Fraud—Purchasers for Value without Notice—Sale by Trustee — Redemption—Acts of Parties to Fraud—Damage.

On appeal from the judgment, reported 2 O.L.R. 134, it was—

Held, that the defendant D. was not personally liable, as he committed no wrong in taking the assignment of the plaintiff's mortgage, and the sale by him under the power of sale therein wrought no change in the plaintiff's rights, as H., the purchaser, became merely trustee for R., the mortgagee, and in his hands the property was redeemable, unaffected by the sale. But—

Held, that the defendant H. was personally liable, as well as the defendant R., for the damage caused by the subsequent sale by him, as he was possessed of the legal title and had the legal power and control, and it was his sale and his act that prejudiced the plaintiff.

Judgment of Meredith, C.J.C.P., varied.

THIS was an appeal by the plaintiff from the judgment of Meredith, C.J.C.P., at the trial, reported in 2 O.L.R. 134, where the facts are stated.

The appeal was argued on the 7th April, 1902, before OSLER, MACLENNAN, MOSS and GARROW, JJ.A.

J. L. Murphy, for the appeal, contended that the property was valued too low and that both the defendants Hunt and Dresskell should have been held liable for the damages as well as Roberts as they had knowledge of the transaction and aided Roberts in the fraud.

Riddell, K.C., and *J. H. Rodd*, contra, contended that Dresskell having only sold under the power of sale in the mortgage to Hunt, who was the nominee of Roberts, and as that sale was invalid the plaintiff was no more damnified than if Roberts or Dresskell, as trustee for him, still held the land; that there was no fraud in a mortgagee selling to himself: *Henderson* v. *Astwood*, [1894] A.C. 150, at p. 158; *Farrar* v. *Farrars' Limited* (1880), 40 Ch. D. 395; that an equity of redemption is an entire right and could not be divided into quarters, and that the Court should not assume jurisdiction over the defendants who resided in the United States of America: Holmsted & Langton, 2nd ed., 285.

Murphy, in reply.

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September 19. The judgment of the Court was delivered by OSLER, J.A. (after stating the facts):—The plaintiff appeals, on two grounds, contending (1) that the value of the land was much greater than the sum at which it was fixed by the trial Judge, and (2) that the defendants Hunt and Dresskell, as well as the defendant Roberts, should have been condemned to pay the loss he has sustained by reason of the improvident sale.

As to the first ground, an examination of the evidence has satisfied me that we should not be warranted in interfering with the learned trial Judge's finding as to the value of the property.

As to the other ground, the defendant Dresskell has incurred no personal liability to the plaintiff. He committed no wrong in taking an assignment of the mortgage, and the sale made by him to Hunt in the exercise of the power of sale wrought no change in the plaintiff's rights. Hunt became trustee for Roberts, and the property while in his hands was still redeemable and so remained until, at the request of Roberts, he conveyed to the club syndicate.

It was that sale and that act which prejudiced the plaintiff, and for that reason I think Hunt is in a different position from Dresskell and is in the same boat with Roberts. He was not a mere stranger to the property and was more than a mere agent or quasi-trustee. He was possessed of the legal title and had the legal power and control over it which he was exercising, no doubt at the instance of Roberts, the beneficial mortgagee, but I cannot see how this relieved him from the duty of selling in a provident manner, having regard to the interests of mortgagor and mortgagee. Moreover, it appears from the evidence of the defendant Hunt himself, that he knew these proceedings were being taken in order to enable Roberts to acquire the title to the property and so to sell to the syndicate. There was no idea or intention of selling it at the highest and best price obtainable, so as to pay off the mortgage and procure something over it for the mortgagor. Lord Selborne's judgment in *Barnes* v. *Addy* (1874), L.R. 9 Ch. 244, may be referred to.

The 3rd and 4th paragraphs of the judgment below *must be varied in accordance with this opinion. In other respects the judgment is affirmed without costs of appeal to either party.

*3. And this Court doth further declare that the plaintiffs are entitled to recover against the defendant F. W. Roberts the sum of $4,875 as the value of the three undivided quarter interests in the said lands sold by the said F. W. Roberts to the defendants F. F. Prentiss, A. H. Van Gorder and F. J. Woodworth.

4. And this Court doth further order and adjudge, that the defendant F. W. Roberts do reconvey to the plaintiffs according to their respective estates and interests in the said lands an undivided one quarter of the said mortgaged premises now vested in the said defendant, F. W. Roberts, and do pay to the said plaintiffs the sum of $4875, less the amount due on the said mortgage for principal and interest, namely, the sum of $1,127.47, being the sum due for principal and interest agreed upon by the parties.

G. A. B

[DIVISIONAL COURT.]

D. C.
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Oct. 7.
Oct. 23.

THE OTTAWA GAS CO. v. THE CITY OF OTTAWA.

Solicitor—Payment by Salary—Costs—Taxation.

By arrangement between the defendants and their solicitor he was to receive a salary of $1800 a year, for all services, including the costs of litigation in which the defendants should be engaged. The present action against the defendants was dismissed with costs on September 14th, 1901. The defendants brought in their bill for taxation :—

Held, following *Jarvis* v. *The Great Western Railway* (1889), 6 C.P. 280, and *Stevenson* v. *The Corporation of the City of Kingston* (1880), 31 C.P. 333, in preference to *Galloway* v. *The Corporation of London* (1887), L.R. 4 Eq. 90, and *Henderson* v. *Merthyr Tydfil Urban District Council*, [1900] 1 Q.B. 434, that in view of the above agreement with their solicitor, the defendants could not tax their costs against the plaintiff.

Judgment of Street, J., reversed.

THIS was an appeal from the judgment of Street, J., reversing the decision of the local Master and deputy registrar at Ottawa, disallowing the whole of the defendant's bill of costs in this action under the following circumstances. Judgment was pronounced on September 14th, 1901, dismissing the action with costs. When the defendants brought in their bill of costs for taxation before the local Master, the plaintiffs objected that by reason of the arrangement existing between the defendants and their solicitor the defendants could not recover against the plaintiffs anything more than their disbursements. It appeared that at the time judgment in the action was pronounced, the arrangement between the defendants and their solicitor was that the latter should receive a salary of $1,800 a year for all services, including the costs of any litigation in which the defendants should be engaged. The by-law providing for this arrangement was passed on February 21st, 1898. After the judgment in this action the defendants took out an appointment to tax their bill of costs on July 16th, 1902. On July 10th, 1902, a by-law was passed amending the earlier by-law of the defendants, by providing that, in addition to his salary, their solicitor should be entitled for his own use to the costs of the actions which he prosecuted or defended for them in which costs were recovered.

The motion was argued on October 6th, 1902, before MEREDITH, C.J.C.P., MACMAHON, and LOUNT, J.J.

H. T. Beck, for the plaintiffs, referred to *Delap* v. *Charlebois* (1899), 18 P.R. 417; *Jarvis* v. *Great Western Railway* (1889), 6 C.P. 280; *Stevenson* v. *The Corporation of the City of Kingston* (1880), 31 C.P. 333; and contended that R.S.O. 1897, ch. 223, sec. 320, sub-sec. 3, was clearly not retrospective.

J. H. Moss, for the defendants, referred to *Galloway* v. *The Corporation of London* (1887), L.R. 4 Eq. 90, and contended that the *Jarvis* case and the *Stevenson* case were distinguishable.

Beck, in reply, contended that the policy of our law was that a solicitor should not be allowed to make a bargain except in regard to non-litigious business, although in England it was otherwise.

October 7. The judgment of the Court was delivered by MEREDITH, C.J. [after stating the facts]:—My learned brother Street was of opinion that the later by-law was the one which governed the rights of the parties.

Upon the argument before us, Mr. Moss, while not giving up that point, did not strongly urge it, and it seems to us that that position cannot be maintained. The judgment, as I have said, was pronounced on September 14th, 1901, and the question as it seems to us is what the rights of the defendants were in the circumstances as they existed at that date, and not what they were on or after July 10th, 1902.

If it were not so, a client might arrange with a solicitor that he should conduct litigation without any charge to him at all, and in the event of success the agreement might afterwards be varied by providing that the solictor should receive his profit costs as well as his disbursements. The statement of that proposition seems to me to contain the answer to the position which was given effect to by the judgment in appeal.

Mr. Moss, however, attempted to support the judgment upon another ground argued before Mr. Justice Street, but as to which that learned Judge did not find it necessary to express an opinion. His contention was that the case of *Jarvis* v.

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Great Western Railway, 6 C.P. 280, was not applicable to such an agreement as that between the solicitor and client in this case. That case was followed (the late Sir Adam Wilson dissenting) in a case of *Stevenson* v. *The Corporation of the City of Kingston*, 31 C.P. 333, and has been recognized in subsequent cases, to which it is unnecessary to refer, and also by the Legislature in the amendment which it made to the Municipal Act, sec. 320, sub-sec. 3, enabling a solicitor to tax costs under an agreement such as that which was effected between the solicitor and the client by the agreement authorized by the by-law of July 10th, 1902.

Mr. Moss, in his able argument, referred to and relied upon the case of *Galloway* v. *The Corporation of London*, L.R. 4 Eq. 90, and also upon *Henderson* v. *Merthyr Tydfil Urban District Council*, [1900] 1 Q.B. 434.

There is no doubt that the judgment of Vice-Chancellor Wood in the *Galloway* case is opposed to the decisions in our Courts, and the practice which has prevailed here; and *Henderson* v. *Merthyr Tydfil Urban District Council* perhaps is also, although in the latter case reliance was placed upon the provisions of the English Attorney's Act of 1870, which authorized an agreement between a client and solicitor for compensating the solicitor by a rate of remuneration different from that fixed by the tariff.

It seems to us that we ought to follow what we understand to be the principle of the decision in *Jarvis* v. *Great Western Railway*, which, as I have said, has been recognized and acted upon, and which is the well understood rule in this Province. It is true that in that case the agreement differed from the agreement between the solicitor and client in this case. In that case the agreement was that the solicitor should receive an annual salary for all his services, and that if costs were recovered in litigated matters, he should also receive those costs; and some stress was placed in the judgment upon the fact that there was never any liability upon the part of the client to pay the solicitor these costs; they only became his in the event of their being recovered in the litigation.

In this case the agreement provides that costs which the corporation recovers are to be paid to the treasurer, and they

go, therefore, to reimburse the corporation *pro tanto* for the salary which it pays to its solicitor. Sir Adam Wilson in the *Stevenson* case, while dissenting from the view adopted by the majority of the Court, was of opinion that a provision such as that was objectionable and contrary to public policy.

In the *Galloway* case and in the *Henderson* case it is said that where a lump sum is payable as salary for all services, if it can be shewn that the client, as the result of the whole transaction, will have nothing, or not as much as the taxed bill to pay, he is not entitled to profit costs, or that the taxed bill must be reduced to what he is liable to pay. And it is pointed out that it is generally almost impossible for the opposite party to shew that such a state of things exists, and that unless he can shew it the fact that the solicitor is paid an annual salary does not disentitle the client to recover the costs of the litigation in which he has obtained an order for the payment of his costs by the opposite party.

As I have said, we think that we ought to follow the *Jarvis* case in our own Courts, and to leave it to the appellants, if they are dissatisfied, to take the opinion of a higher Court, where possibly the English practice, so far as it differs from ours, may be held to be the proper practice.

The order of Mr. Justice Street, must, in our opinion, be reversed, and the order of the local Master restored, with costs to the appellants.

[October 23. Leave to appeal to the Court of Appeal was refused by Moss, J.A.]

A. H. F. L.

[DIVISIONAL COURT.]

D. C.
1902
Oct. 7.

CROW'S NEST PASS COAL COMPANY v. BELL.

Defamation—Libel—Pleading—Defence—Fair comment—Absence of justification—Striking out defences.

In an action for an alleged libel contained in an article in the defendants newspaper, the defendants pleaded fair comment, but did not set out the facts upon which it was alleged the article was fair comment, or allege the truth thereof :—

Held, that the defence was bad, and should be struck out.

DEFENDANTS published in the *Canadian Mining Review* the following, among other statements, respecting the plaintiff:

"And it can hardly be a pleasant reflection for loyal Canadians that a property which by common consent is one of the most prodigal gifts of Nature, one which is absolutely unique in value and kind, should already have passed beyond the control of Canadians to whom it was originally entrusted, should have been officered and managed almost exclusively by Americans, who, in several important respects which need not be here dwelt upon, have begun to shew their total disregard both for the sentiments and interests of Canadians. Actual discrimination against Canadian interests has already taken place.

"Mr. Sifton has made the West his study, and its development his ambition. He is responsible for the construction of the Crow's Nest Pass Railway, which has been the determining factor of the opening up of the Kootenays. We are satisfied, and with confidence add our appeal to that of our contemporaries, that he will not allow any private interests nor the interests of any corporation to have the slightest weight in the matter under consideration, but that upon a full consideration of the case he will be prepared to say that no combination of interests, and certainly no purely American policy, shall prevent the success of the great project he had in view when he fathered the western policy with which his name is identified.

"He must be aware of what is patent to every one in British Columbia that the control of the coal corporation, for

whose existence he is also responsible, has passed entirely into American hands, and that this furnishes an additional reason why he should identify himself with purely Canadian interests by stepping into the breach, making a prompt selection in accordance with the terms of the statute, and saying to the people of Canada, 'Here are your coal lands, operate them in order that our mining and smelting industries may be free from the control of any monopoly whether Canadian or American.'

"Whilst Canadian consumers have been clamouring in the past season both for coal and coke, and have often been unable to obtain the necessary supplies to keep our smelters in operation, train loads of coal and coke have been passing daily into the States, either by way of Lethbridge and Great Falls or by way of Creston Junction and Bonners Ferry, and in the late fall matters reached such a crisis that it was only by determined action of the railway company, who refused to supply cars for the carriage of fuel to American points whilst our own smelters were unsupplied, that we were able to get what we wanted."

The defendants pleaded, among other things, by paragraph 4, "that the words quoted and set out by the plaintiff in the said paragraphs of the statement of claim from the said article, were used by the defendants in the said article as indicating reasons why the Government of Canada should not delay the selection of the 50,000 acres of coal lands, as provided by the Act of the Dominion Parliament, 60 & 61 Vict. ch. 5, and so that the said coal lands when selected might be opened for public competition and for competition with and against the plaintiff;" and in paragraph 6, "that the said article containing the extracts set out in the statement of claim was a fair and impartial comment on the matters above referred to, and was published by the defendants *bonâ fide* for the benefit of the public and without any malice towards the plaintiff."

The plaintiff moved to strike out the 4th and 6th paragraphs of the defence as tending to embarrass and delay the fair trial of the action, and because they did not disclose any reasonable answer, or for a further and better statement of the nature of the defence or for particulars, and on September 26th, 1902, the Chancellor struck out paragraph 4 on the

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ground that it was not open to the defendants to say in what sense they ascribe defamatory words, and amended paragraph 6 by striking out the word "above," and inserting therein after the words "referred to" the words "in the said article."

From this order the plaintiff appealed to the Divisional Court asking that paragraph 6 should be struck out on the ground that it disclosed no reasonable answer, that the defendants had attempted to plead "fair comment" without separating the statements of fact from what might be held to be comment thereon, that to the extent the words complained of were statements of fact they were inventions of the defendants and there could be no plea of "fair comment" as to these, and that to the extent to which the words complained of by the plaintiff are statement of fact the defendants must plead their truth and give particulars.

The appeal was argued on October 6th, 1902, before MEREDITH, C.J.C.P., and MACMAHON and LOUNT, JJ.

G. G. S. Lindsey, K.C., for the plaintiff, contended that since *Wills* v. *Carman* (1889), 17 O.R. 223, there has been an inclination to get in evidence of the truth of libellous statements at the trial under a plea of "fair comment;" but statement of fact and comment are very different things: *Lefroy* v. *Burnside* (No. 2), (1879), 4 L.R. Ir. 556; that the words complained of here are practically allegations of fact which are invented by the defendants; and that they should not be permitted under a plea of fair comment to shew the existence of this state of facts at the trial without any plea of justification on the record; that Odgers on Libel and Slander, 3rd ed., p. 672, plea 29 (and not plea 30), gives the proper form of plea for the defendants here, clearly separating, as it does, statement of fact and comment, and alleging the facts to be true: *Lord Penrhyn* v. *Licensed Victuallers' Mirror* (1890), 7 Times L.R. 1; *Brown* v. *Moyer* (1893), 20 A.R. 509; and *Manitoba Free Press Co.* v. *Martin* (1892), 21 S.C.R. 518, especially at p. 530; *Davis & Sons* v. *Shepstone* (1886), 11 App. Cas. 187; Odgers *ib.*, pp. 41, 200; that if the defendant is allowed to plead justification, he must shew clearly how much he justifies and how much he does not: *Fleming* v. *Dollar* (1889), 23 Q.B.D.

388; that particulars should be given where it is not clear whether the defence is that what is charged against the plaintiff is true or that it is truly reported: *Hennessey* v. *Wright* (1888), 36 W.R. 879; Odgers *ib.*, p. 571.

A. E. Knox, for the defendants, contended that they had pleaded substantially after the form given as No. 30 in Odgers *ib.*, p. 673, and that paragraph 6 should therefore remain; and admitted that they must shew the existence of the facts at the trial under the plea of fair comment; that the rest of the article was fair comment on those facts; but that all that was necessary was to prove the facts substantially; and they should not be required to plead or to prove the exact truth: *Brown* v. *Moyer*, 20 A.R. 509; *Wills* v. *Carman*, 17 O.R. 226.

Lindsey, in reply, contended that in the plea at p. 673 of Odgers, the facts were contained in a privileged article, whereas here the defendant had invented his facts.

October 7. The judgment of the Court was delivered by MEREDITH, C.J.:—This is an action for libel, the libellous matter complained of being an article referring to the appellant company's operations, contained in a newspaper published or alleged to be published by the respondents.

One of the defences set up is that of fair comment.

The learned Chancellor, upon the application of the plaintiff to strike out that defence, directed that the pleadings should be amended. The appellant is not satisfied, and has appealed from the order, contending that even with the amendment which the learned Chancellor directed to be made, the defence is insufficient.

The article complained of contains a number of allegations of fact—statements of fact—and the paragraph of the statement of defence objected to does not attempt in any way either to give a statement of the facts upon which it is alleged the article was fair comment, or allege that the statements of fact in the article complained of were true.

We think the position of the appellant is right.

It is clear upon the authorities that a man may not invent his facts, and then comment upon them and succeed upon the ground that, the facts being assumed to be true, the comment is fair.

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The matter has been the subject of discussion in a good many cases in this Province and Dominion and elsewhere.

In *Penrhyn* v. *The Licensed Victuallers' Mirror*, 7 Times L.R. 1, the form of defence is given in which the defendant, who set up the defence of fair comment, where there were matters of fact alleged, stated, that so far as the article complained of contained statements of fact, those statements of fact were true, and that as to the other matters they were matters of fair comment; and that was held to be the proper form of pleading in such a case.

In *Manitoba Free Press Co.* v. *Martin*, 21 S.C.R. 518, *Brown* v. *Moyer*, 20 A.R. 509, and *Douglas* v. *Stephenson*—a decision of this division—(1898), 29 O.R. 616, afterwards affirmed by the Court of Appeal, this view of the law is recognized and acted upon.

It seems to us, therefore, that the order of the learned Chancellor did not go far enough, and that the pleading must be struck out, unless the respondent elects to amend, by either setting out a statement of the facts with regard to which he alleges the article was a fair comment, or, in the other form, justifies the statements of fact contained in the article, and as to the other matters pleads that they were fair comment upon those matters of fact.

Two forms of pleading this defence are given in Odgers on Libel and Slander, 3rd ed., numbers 29 and 30, pages 672 and 673.

The form of pleading, number 29, is that which was recognized as the correct pleading by the Divisional Court composed of Justices Mathew and Grantham, in *Lord Penrhyn* v. *The Licensed Victuallers' Mirror*. The fourth paragraph, which is the material one, is as follows:

"In so far as the said words consist of allegations of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion they are fair comments made in good faith and without malice upon the said facts, which are matters of public interest."

The other form it is not necessary to refer to.

The respondent should have ten days in which to make his election and to amend.

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The motion of the appellant also asked for particulars of the defence. We think it would be premature to determine anything as to that until the form of pleading is settled. It may be that the pleading may contain all the information that the respondent is required to give, and, therefore, we do not interfere with the order in that respect, but leave the appellant, if so advised, to apply when the pleading is placed upon file.

The costs of the appeal will be to the appellant in any event.*

*The order made was as follows:—

"This Court doth order that paragraph numbered 2 of the said order" (*i.e.*, the order of Boyd, C.) "be struck out and the following paragraph be substituted therefor:—

"This Court doth order that the words 'The said article containing the extracts set out in the statement of claim was a fair and impartial comment on the matters referred to in the said article and was published by the defendants *bonâ fide* for the benefit of the public and without any malice towards the plaintiff,' in paragraph 6 of the defendants' statement of defence, be and the same are hereby struck out, with leave reserved to the defendants within ten days from this date to amend the aforesaid portion of their statement of defence by setting out the facts upon which the defendants allege the article complained of was a fair comment and alleging the truth thereof, and by setting up as to the matters of opinion in the article complained of that they were fair comment upon such matters of fact.

"And this Court doth further order that the costs of this appeal be costs to the plaintiff in any event of the cause."

A. H. F. L.

[IN THE COURT OF APPEAL.]

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HENNING v. MACLEAN.

Will—Construction—Alternative Disposition—Death of Testator and Wife "at the Same Time."

The testator bequeathed to his wife all his estate and appointed her his executrix. His will then proceeded: "In case both my wife and myself should by accident or otherwise be deprived of life at the same time I request the following disposition to be made of my property"—disposing of his estate and appointing executors. A few months after the making of the will the testator and his wife went to Europe, and both of them died there, the wife on the 11th December, 1888, and the testator on the 27th of the same month:—

Held, that the testator and his wife were not deprived of life at the same time, the deaths not being the result of a common accident or other catastrophe, and as the actual event was not provided for there was an intestacy.

Held, also, that there was no power in the Court to interpolate any such words as "or in case I shall survive her."

Judgment of a Divisional Court, 2 O.L.R. 169, affirmed.

MACLENNAN and GARROW, JJ.A., dissenting.

THIS was an appeal by the defendants Catherine I. Maclean, Minnie MacTavish, and the executors of the deceased defendant Marianne Ball, from the judgment of a Divisional Court, reported 2 O.L.R. 169.

The appeal was argued on 14th April, 1902, before ARMOUR, C.J.O., and OSLER, MACLENNAN, MOSS, and GARROW, JJ.A.

The material parts of the will are set out in the report of the case in the Court below.

Aylesworth, K.C., and *A. S. Ball*, for the appeal. Unless the words of the will are narrowed down to "at the same instant," the testator and his wife died at the same time, for they were both ill at the same period, and the husband did not recover from his illness after the wife's death; therefore they died at the same time within the meaning of the will. "At" does not mean the "same instant of time," but "during a period of time:" Murray's New English Dict., sec. 29 *b*; *Marklew* v. *Turner* (1900), 17 Times L.R. 10, and cases cited in the Divisional Court.

Robinson, K.C., *H. J. Scott*, K.C., and *H. O'Brien*, K.C., for the plaintiffs, *contra*. It is really a question of fact who died

first. There was a period of sixteen days between the two deaths. The words are plain, and should be construed as of their every day use. The deaths were not one chain of events or resulting from any common cause, but at different times and of different ailments.

J. G. O'Donoghue, for the defendant Clara Henning.

Aylesworth, in reply. The testator was really moribund, and that means in a dying condition.

October 9. ARMOUR, C.J.O.:—I cannot understand how in the present state of the English language it can be said, in the case of two persons, one dying on the 11th and the other on the 27th of the same month, that they were both deprived of life at the same time, and in such case I should be compelled to say that they were deprived of life at different times.

In order to give the effect contended for to the will, we should have to interpolate after the words, "at the same time," the words "or in case I shall survive her," a liberty which we have no power to take.

The appeal should be dismissed with costs.

OSLER, J.A.:—I think the judgment of the Divisional Court should be affirmed.

I am unable to understand how two persons can by any reasonable intendment in the construction of plain language be said to have been deprived of life "at the same time," no matter what may have been the cause of their deaths, when one of them has survived the other by a fortnight.

If, therefore, the event of the testator and his wife being deprived of life at the same time, was an event or condition on the happening of which only, the bequests provided for by the second clause of the will were to arise, I think they fail, because that event did not happen. On the contrary, the testator survived his wife for the time I have mentioned; and, if that be material, was for the greater part of the period in such a condition as to be capable of making another will.

It is, however, suggested—though the point was not taken below—that reading the first and second clauses of the will together, the latter should be considered as meaning "in case

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my wife does not survive me," and that the testator meant by the language he has employed in the two clauses to provide simply for the two events, that of his wife surviving him and that of her not surviving him. With all respect, I think that to adopt this construction would be to take an inadmissible liberty with the (to me) plain words of the instrument. To paraphrase it in this manner would be to make a will for the testator, and to provide for an event which, for anything we can know, he may have anticipated, reserving his intention to make a different disposition of his property if it should occur.

What the testator tells us is practically this: if my wife survives me, I give her all; if we should die at the same time by accident or otherwise—in which event she will of course take nothing, and I shall have no opportunity of making another will — I provide for that event by the following dispositions: there is a third contingency, that of my surviving her, but if that occurs, it will be time enough for me to consider what testamentary disposition I shall then make of my property.

To read the second clause as merely saying, "in case my wife does not survive me," would be to include the two contingencies—(1) of the testator and his wife both dying at the same time, which is what is expressly provided for; and (2) of her predeceasing him, which is not.

The language of the clause, I repeat, is to me too plain to warrant us in holding that the true contingency guarded or provided against was the mere non-survival of the wife, and I, therefore, cannot treat the case as being ruled by such authorities as *Davies* v. *Davies* (1882), 47 L.T.N.S. 40, and others of that class.

MOSS, J.A.:—After much consideration, I find it impossible to say that the words of this will on which all the controversy turns, viz., "In case both my wife and myself should by accident or otherwise be deprived of life at the same time," can be made to include the circumstances which actually occurred.

The testator and his wife both died after illness, the latter apparently from an unusually severe attack of a malady from which she had long been a sufferer, the former from pneumonia developed after an attack of liver complaint.

An interval of sixteen days elapsed between the deaths—that of the wife having occurred on the 11th, and that of the testator on the 27th of December.

The latter was not confined to bed or house during the whole interval, and from the 14th to the 24th he was considered as making progress towards recovery.

On the 26th he was able to discuss business with the proprietor of the house at which he was a guest, and to give him a power of attorney.

It appears to me that we could not hold that two persons dying as and when these two persons died were deprived of life at the same time, without subjecting the language to too violent a wrench.

But another important question has been raised in this Court. It is argued, upon the construction of the will, that with the comparatively infrequent and unlikely contingencies that the language employed by the testator would appear to provide for, must also be included the more likely and far more comprehensive case of his wife dying before him.

Indeed, it is argued that the latter contingency is that for which the testator was chiefly providing.

I should not be sorry to adopt this view if I could satisfy myself that the language permitted of it. But I think the words used are too precise and unambiguous to allow us to say that the testator was either contemplating or intending to provide for the simple case of his wife predeceasing him.

It is true he was not a member of the legal profession, but as the learned Chief Justice of the King's Bench observes, he was a man careful in the use of words.

In all its parts the will shews that he was quite capable of giving expression to his wishes with clearness and precision. If his object had been to provide for the case of his wife dying before him, we can see that he would have had no difficulty in expressing that intent in clear and simple terms. That he carefully used language pointing to an entirely different case or set of circumstances shews that his mind was not directed to that case. We may surmise that if, when preparing the will, he had been told that he was not providing for the case of his wife not surviving him, he would have directed that the

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same dispositions should take effect, but we cannot say so with any certainty. I do not think we can find that he has used language which at all expresses that wish, nor can I gather from the rest of the will an implication that he must have intended that.

The cases relied upon do not assist. What they have determined is that where a gift over is expressed to take effect on the discontinuance or defeasance in some specified manner, or on the happening of some specified event, of a preceding gift, if you can see from the will, or the nature of its provisions, that really the intention of the testator was that the executory gift should take effect on any failure whatsoever of the preceding limitation, whether it was the specified event or any other event, then you must give effect to the intention of the testator.

But these cases all proceeded upon the doctrine that the event on which the gift over was to come into operation was an event implied by, if not expressly indicated by, the language of the will. That is to say, you must find in the will or the nature of the provision something that raises an implication of the intention of the testator: *per* Bowen, L.J., in *In re Tredwell, Jeffray* v. *Tredwell*, [1891] 2 Ch. 640, at p. 656.

I am not able to read the words of this will as indicating any intention whatever in the case of the testator's wife dying or being deprived of life before him. I cannot assume from the language he has used, that it did not occur to him when framing the will, that in case of that event happening he would have to make a new will. It may be that in taking a duplicate of the will with him on their trip, he contemplated further discussion of its terms with his wife, and that with that idea he provided against the possible happening of an event, which would deprive them of the opportunity of altering it. It is true, that on the day before his death he remarked that he had made his will, but not much weight can be attached to that statement as indicating his views at the time he was framing the will.

There is nothing unusual in his thinking of the possibility of something happening to himself and his wife during their travels and of his providing against it. There are numerous

instances in the books of testators having made somewhat similar provisions. And, highly improbable and extraordinary though it may be that such a state of affairs should arise as of their perishing together, yet, that was precisely what happened and gave rise to the litigation in *Underwood* v. *Wing* (1855) 4 DeG. M. & G. 633, and *Wing* v. *Angrave* (1860), 8 H.L.C. 183, and in *Elliott* v. *Smith* (1882), 22 Ch. D. 236.

The first two of these cases had relation to the same parties. A husband and wife made separate wills each in the other's favour. They provided for the event of either dying in the other's lifetime. They perished at sea, being swept off a vessel's deck by one wave and disappeared together. It was contended that the words, "in case my wife shall die in my lifetime," in the one case, and the words "in case my husband shall die in my lifetime," in the other, might be read as intending to provide not merely for the case of the legatee dying in the lifetime of the testator or testatrix, but dying at the same time. But this construction was rejected in both cases.

In the case before the House of Lords, Lord Wensleydale said at p. 214: "This case (and there are many like it) is one in which the temptation from the supposed hardship of the case to swerve from the established rules of construction is strong. No one can doubt as to the testatrix's 'intention,' in the loose sense of that word. No one can suppose that she really meant not to give the property to Wing, if her husband and herself should happen to die at the same moment. No one doubts, that, had she thought of such a possibility at the time she made her will, she would have provided for it by express words. But it cannot be too often repeated, that the true question in all these cases, is not what the testratrix *intended to do*, but what is the meaning of the words used in the will." And again (p. 216) he said: "But I cannot think, that the mere circumstance of intestacy in the supposed event of contemporaneous death can alone be sufficient to alter the construction of the clear words of this clause. The more reasonable inference is that the testratrix omitted altogether to consider the supposed case of contemporaneous death, and that it is therefore unprovided for. And I do not think that the

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decision in the case of *Jones* v. *Westcomb* before Lord Chancellor Harcourt, and many subsequent cases, referred to at your Lordships' Bar, and which have been commented upon by my noble and learned friend on the Woolsack, where from the words used, the Court has seen that the intention was that the limitation over was to take effect on failure of the precedent estate, are any authority for altering the express words of condition on which the limitation over depends."

And in considering the words on which the limitations over depend, it is important to observe that the prior gift to the testator's wife was of the whole estate absolutely. None of the contingencies on which the testator has said the gift over is to take effect can be overlooked. "It appears to me," said Vice-Chancellor Sir W. Page Wood, in *In re Sanders' Trusts* (1866), L.R. 1 Eq. 675, at p. 681, "that, upon a will constructed as this is, where the testator first of all makes a gift which exhausts the whole interest, and then comes to consider another state of circumstances altogether, that I cannot neglect any of the contingencies upon which the gift over is to take effect."

The contingencies on which the testator intended the substitutional provisions of his will to take effect are so clearly, precisely, and unambiguously expressed, that I do not feel at liberty to introduce by implication any other supposed contingency.

I am compelled, therefore, to the conclusion that the judgment appealed from should be affirmed.

MACLENNAN, J.A.:—The contention of the plaintiffs is that the testator's will has made no provision for the event which has happened, namely, the case of his wife predeceasing him; and that such being the case, the result is, that his estate is wholly undisposed of by his will, and devolved as in a case of intestacy.

In the first part of the will, the testator gives all his estate, real and personal, to his wife, and appoints her executrix thereof. He then proceeds thus: "In case both my wife and myself should by accident or otherwise be deprived of life at the same time, I request the following disposition to be made of my property, viz.:"

He then proceeds in six somewhat lengthy clauses to make a particular distribution of his estate, giving an annuity of $500 to the plaintiff John Henning, his brother, for life, to be continued to his wife and daughter should they survive him, and giving the rest partly to Knox College and the missions of the Presbyterian Church, and partly to his wife's relatives, and appointing the respondents Kenneth Maclean and Edward Betley Brown his executors.

The will was drawn by the testator himself on the 10th June, 1887. His wife died on the 11th, and the testator himself on the 27th of December, 1888.

Then, what is the true construction of the will? The testator is making his will in contemplation of his own death. That is what is uppermost in his mind. "I do make *this my last* will and testament." No contemplation of any subsequent or further will.

The first clause contemplates his wife being alive at his own death. He gives all to her in that case, and makes her sole executrix. It is as if he had said, "I give all to her if she shall be living at my death." He knows that if she should not be then living his gift to her would fail.

That case having been provided for, he next considers the case of her not being then living. That is the case which still remains to be provided for. It is said he has not provided for the general case of her not being then living, but only for one particular and very special instance of the general case, namely, the case of his wife dying at the very same instant as himself. If that is so, it is certainly very strange. However, he does proceed to consider, if not *the case* of his wife not surviving him, *one* of the cases of her not doing so, and what is to be done with his property in that case. He himself is dead, and what if his wife shall also be dead at the same time, by accident or otherwise, so as not to take his property as provided in the first clause?

The phrase he uses is: "In case both my wife and myself should by accident or otherwise be deprived of life at the same time, I request," etc. "Deprived of life" is equivalent to "dead," and the phrase is as if he had said, "In case both my wife and myself should *be dead* at the same time."

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It is true, that language is large enough in itself to include the case of the wife dying after him, as well as the case of her dying before him, but he has already in the first clause provided for the first case, namely, that of her dying after him. That is provided for in the first clause, and the second clause will, if possible, be construed so as not to defeat the first, but rather so as to be consistent with it.

I think it cannot be denied that the event which has occurred is a case of both being *deprived of life,* that is, *dead* at the same time.

The will is to operate at the testator's death and not before, and at the same time the wife is dead also.

I think that is the true construction of the will. Unless it be so construed, the result is intestacy. The testator has failed to do what he intended to do, namely, to dispose of his property at his death. The Court favours a construction which prevents intestacy: Jarman on Wills, 5th ed., 809 *n* (1).

The scheme of the will is very simple. If his wife survived him she was to have everything and be sole executrix. If she should not survive him, it was to go partly to his own relatives, partly to the relatives of his wife, and partly to charity, and two of his wife's relatives were to be executors. He did not intend to die intestate to any extent. It was his last will and testament, and every intendment ought to be made of which the *language used* fairly admits to prevent intestacy. I think the language used admits of that.

In the case of *Davies* v. *Davies,* 47 L.T.N.S. at p. 42, in order to give effect to the general scope of a will, Fry, J. held that the words, "In case of my wife dying *within* twelve months of my own decease," meant the case of her not being alive at the expiration of the twelve months, and so included the case which happened, namely, her having died before the testator.

If it were necessary to the decision of this case, which I do not think it is, to say, that the testator's act was irrational and absurd if he meant to confine the disposition made in the second clause of his will to the case of his wife and himself dying at the same moment of time, and that he did not intend to provide for the general case of his wife not surviving him,

but in case of her dying before him meant to die intestate, I should be compelled to say it was.

I think the testator has used words which are capable of a meaning which gives effect to the testator's intention; and that being so, I think we are bound to adopt that meaning.

In the goods of Hugo (1877), 2 P.D. 73, referred to by the Chief Justice in his judgment in the Divisional Court, was a totally different case from the present. There the testator had made a will, and some years after he and his wife made a joint will, expressed to be "In case we should be called out of the world at one and the same time by one and the same accident." It was held to be conditional, and the event not having occurred, inoperative, so as not even to revoke the previous will.

I think the appeal should be allowed.

GARROW, J.A.:—On the 10th of June, 1887, Thomas Henning, a resident of the city of Toronto, made his last will, whereby in the first paragraph he gave and bequeathed to his wife, Isabella Henning, all his estate real and personal, and appointed her sole executrix.

In the next paragraph, he used the following words: "In case both my wife and myself should by accident or otherwise be deprived of life at the same time, I request the following disposition to be made of my property, viz.:" Then follows a series of alternative or substitutional gifts, which may be summarized as follows: (1) An annuity of $500 to his brother John, one of the plaintiffs, to be continued to his wife, Elizabeth, and his daughter, Jane, if they survived him; with an ultimate gift of the whole annuity to the bursary fund of Knox College, Toronto; (2) An annuity of $500 to his wife's sister, Marianne Ball. At her death, this sum to be divided equally between her daughters, Mrs. Maclean and Mrs. MacTavish. On the death of either of these, her share to be given to the fund for foreign missions of the Presbyterian Church of Canada, and on the death of the other, her portion to be paid to the home mission fund of the same church; (3) An annuity of $500 to his wife's sister, Jane McKenzie. On her death, this sum to be divided equally between her grandchildren, Alice and Effie Rhind. On the death of either of these, her portion to go to the fund for

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the support of the aged and infirm ministers of the said church, and on the death of the other, her portion to go to the fund for the widows and orphans of ministers of the said church; (4) "All personal property such as clothing, jewellery, etc., remaining, is to be given to Marianne, wife of Rev. W. S. Ball, Vanneck, to be disposed of, according to directions given in memorandum enclosed herein." "In case of the death of the said Marianne Ball, the same remains are to be given to Catharine Isabella Maclean, to be disposed of on the instructions left for her mother." And he therein appointed the defendants Kenneth Maclean and Edward Betley Brown "as executors of this my last will and testament, and to divide equally between them what may remain of the annual income of my investments after paying the fifteen hundred dollars disposed of as above."

The will was prepared by the testator himself without, so far as appears, any advice or assistance from a lawyer.

Shortly after its execution, Thomas Henning and his wife proceeded to Europe, and apparently had temporarily settled at Florence, Italy, where they both died—the wife on the 11th December, 1888, and the testator sixteen days afterwards, on the 27th December, 1888, leaving no child or children or the descendants of a child or children.

The estate consisted wholly of personal property, and was valued on the application for probate at $27,914.40.

The will appears to have been executed in duplicate, the testator retaining one copy, which was found among his effects after his death; the other was deposited with the executor, Edward Betley Brown, and remained in his possession until after the testator's death, when he, in conjunction with his co-executor, proved the will in the surrogate court for the county of York in common form, the letters probate bearing the date of January 2nd, 1889, and from thence until this action began, these executors have administered the estate upon the view that the gifts over took effect notwithstanding that the wife predeceased her husband, and upon the correctness of that view, of course, depends the title of the executors themselves as well as the validity of the gifts over.

Now, after an interval of some twelve years' apparent acquiescence, the plaintiffs, who are the next of kin of the testator, by this action claim that because the wife did not die "at the same time" as the testator, the substitutional gifts over utterly failed, and Thomas Henning in fact died intestate.

At the trial before the learned Chief Justice of the Queen's Bench Division, evidence was received, subject to objection—but I think properly received—to shew that the estate had been materially contributed to by the testator's wife, who had for many years carried on a young ladies' school at Toronto, and that the division of the estate as contained in, what I may call the substitutional clauses of the will, was the result of conferences at all events, if not of actual agreement, between the husband and wife preparatory to the actual making of the will.

The question is one of construction, and in order to construe, the Court is entitled to be put in possession of the surrounding circumstances, existing at the time the will was made; to be placed, in fact, as far as possible, in the position of the testator at that time, so as to properly estimate the true meaning and intention of the words he has used in disposing of his estate.

The words of difficulty are contained in the second clause: "In case both my wife and myself should by accident or otherwise be deprived of life at the same time, I request the following disposition to be made of my property," etc.

The learned Chief Justice of the Queen's Bench Division at the trial held that the deaths, although separated by a period of sixteen days, were really "at the same time," thus treating the words as in effect creating a condition precedent to the vesting of the gifts over, but a condition precedent which has been in fact substantially performed.

The Divisional Court, however, dissented from this view, upon the ground that the interval having been so long, it was impossible to say, that both deaths had taken place "at the same time."

If that was the only question involved, I would, I think, agree with the judgment of the Divisional Court, for elastic as the word "at" or the phrase "at the same time" may be, I cannot bring myself to agree, that it would be reasonable to

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say under any circumstances that persons who died sixteen days apart really died at the same time.

But, with deference, it appears to me that the judgment of the learned Chief Justice of the Queen's Bench Division can and ought to be sustained, upon a ground apparently not brought to his notice nor referred to in the Divisional Court.

No one can doubt, I think—I certainly do not—that could the testator when drawing his will have anticipated the event which actually happened of his wife predeceasing him, he would have provided for that event, as well as for the much more improbable one of both dying at the same time.

The will was not, I think, intended to serve a mere temporary purpose. It is drawn with great care. Minute subdivisions are carefully provided for, and even a division of clothing and jewellery is not forgotten. Unfortunately, the memorandum as to the division of the latter is not before us, so that we are not informed precisely as to whether it was his clothing and jewellery or his wife's, or both, which were included in the bequest.

But, however that may be, the will itself by its terms seems to support the suggestion that it was made, as the result of the conferences between the testator and his wife, and was probably intended to effect an equitable distribution of the estate, which, although standing in his name, was lawfully his wife's, morally if not legally, to the extent at least, that it was both a natural and a proper thing, that she should have been consulted in its division, and that her relations as well as his should share in it.

Of course, it was a revocable instrument. The testator could at any time have altered or revoked it. Even after his wife's death, he was apparently, although ill, of sufficient strength to have made a new will had he so desired. But instead of doing so, he spoke at that time, after his wife's death, when the will in question—according to the present contention of his next of kin—had become inoperative of having made his will, indicating that, however his next of kin may now regard it, he did not then think he was dying intestate. This evidence was, I think, strictly admissible for what it is worth: *Sugden* v. *Lord St. Leonards* (1876), 1 P.D. 154, at p. 228.

So that I have no difficulty in holding, that the testator regarded his affairs as finally settled, and that he intended the well considered scheme of the will in question to have full effect at his death. It was not, I infer, a mere temporary expedient executed in view of the approaching journey, and, after it was over, to be reconsidered, and perhaps changed.

By the terms of the will, he evidently and clearly intended his wife to have the whole, if she survived him. No one doubts that. Is it not equally plain and free from doubt, that he intended the substitutional gifts to have effect, if she did not survive him? In my opinion it is. The whole scheme of the will is constructed around the two events—the one his wife surviving him, the other, that she does not.

But, unfortunately, his language seems to infer that he expected her to live at least as long as he did, and he therefore provides expressly for the fantastic and practically impossible event, of both dying at the same time from accident or otherwise, while apparently overlooking the much more probable event of her predeceasing him.

It is not reasonable, in my opinion, to hold that the testator intended the carefully considered gifts over to depend for their validity on the apparent condition, that his wife should live long enough to die at the same moment as himself. The idea which he intended to express, and which in my opinion he has sufficiently expressed, is that these gifts over were to be effectual if his wife did not survive him, and so take the prior gift to herself, which, in my opinion, she would have taken if she had survived him even for a moment.

But it is not, in my opinion, necessary to go quite so far.

Jarman on Wills, at p. 1642 (5th ed.), says: "Sometimes, however, an executory gift is made to take effect in defeasance of a prior gift, *i.e.*, to arise on an event which determines the interest of the prior devisee or legatee, and it happens that the prior gift fails *ab initio* either by reason of its object (if non-existing at the date of the will) never coming into existence, or by reason of such object (if a person *in esse*) dying in the testator's lifetime. It then becomes a question whether the executory gift takes effect, the testator not having in terms provided for the event which has happened, although there

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cannot be a shadow of doubt that, if asked whether, in case of the prior gift failing altogether for want of an object, he meant the ulterior gift to take effect, his answer would have been in the affirmative. The conclusion that such was the actual intention has been deemed to amount to what the law denominates a necessary implication."

See this passage cited with approval by Lindley, L.J., in *In re Tredwell, Jeffray* v. *Tredwell*, [1891] 2 Ch. 640, at p.654.

"Necessary implication" is defined by Sir W. M. James, L.J., in *Crook* v. *Hill* (1871), L.R. 6 Ch. 311, at p. 315, as meaning, not natural necessity, but so strong a probability of intention that a contrary intention cannot be supposed.

In the case before referred to of *In re Tredwell, Jeffray* v. *Tredwell*, Bowen, L.J., says at p. 656: "We have been pressed by authorities which relate to a class of cases wholly different —cases of gifts over. Now, where a gift over is expressed to take effect on the discontinuance or defeasance in some specified manner, or on the happening of some specified event, of a preceding gift or limitation, it is true that if you can see from the deed *or from the nature of its provisions* that really the intention of the testator was that the executory gift should take effect on any failure whatsoever of the preceding limitation, whether it was the specified event or whether it was any other event of any kind, then you must give effect to the intention of the testator. It is immaterial in such a case, as Chief Justice Lee says in one of the cases which were cited before us, whether the first gift or limitation fails in its inception or fails in the result—whether it fails, in other words, because it never came into existence, or whether, having come into existence, it fails in the particular manner specified by the testator. But, as Lord Cranworth points out in the case of *Underwood* v. *Wing*, 4 DeG. M. & G. 633, when he is dealing with these authorities, those cases all proceeded on the doctrine that the event on which the gift over was to come into operation was an event implied by, if not expressly indicated by, the language of the will. That is to say, you must find in the will and the nature of the provision, something that raises an implication of the intention of the testator."

These remarks are applicable to the case in hand. I think there is sufficient indication in the language of the will, aided as it is by the nature of the provisions themselves, for those whom the testator evidently intended to benefit in some event, to raise if necessary this "necessary implication," and that the true rendering of his will, in so far as the gifts over are concerned, is to read it as if the much discussed words before quoted were simply "in case my wife does not survive me," in which case of course the gifts over would take effect: see *Tennant* v. *Heathfield* (1855), 21 Beav. 255; *MacKinnon* v. *Jewell* (1831), 5 Sim. 78; (1833), 2 My. & K. 202; *Davies* v. *Davies* (1882), 30 W.R. 918; *Avelyn* v. *Ward* (1749), 1 Ves. Sen. 420; *Hall* v. *Warren* (1861), 9 H.L.C. 420; *In re Lowman, Devenish* v. *Pester*, [1895] 2 Ch. 348.

The construction contended for by the respondents would destroy the will, and for that reason alone is not to be adopted unless it is impossible to so construe it, as to give effect to what may fairly be collected to have been the testator's intention: *Lett* v. *Randall* (1839), 10 Sim. 112, at p. 115.

For these reasons I think the appeal should be allowed, and the action dismissed with costs.

G. A. B.

[IN THE COURT OF APPEAL.]

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Will—General Gift—Context Confining it to Real Estate—Deleted Words—Right to Look at.

By one of the clauses of his will, a testator, gave to his nephew his mill, tannery, houses, lands and all his real estate, effects and property whatsoever and of what nature and kind soever at a named place, chargeable with certain legacies :—

Held, that although the clause when taken by itself would include personal as well as real property at such place, yet when read with other clauses of the will, and the whole context taken into consideration, the gift was limited to real estate only.

Quære, whether in construing a will deleted words can be looked at.

THIS was an appeal by Horace Thorne, Anna Maria Thorne and Catharine Thorne from the judgment of the Divisional Court allowing the appeal of the plaintiff, John Mills Thorne, and certain of the defendants, the present respondents, from the report or certificate of the Master in Ordinary, dated the 4th June, 1901, and setting aside the said report or certificate, and by which order of the Divisional Court it was declared that according to the true construction of the will of the testator, William Thorne, the gift to the plaintiff, William Henry Thorne, did not pass to the said William Henry Thorne the sum due by him and B. J. Thorne, carrying on business under the name and style of W. H. and B. J. Thorne, to the testator.

The will of the testator William Thorne was dated the 28th September, 1867. It was divided into a number of paragraphs, and, although not numbered in the original, for convenience numbers have been inserted. In the original will certain words were struck out and these words appear in italics. The words struck out did not appear in the probate, and the fact of their being so struck out did not appear until the case was in the Court of Appeal, when the original will was produced.

By the will the testator appointed William Parsons, John Mills Thorne, the plaintiff, George Burt, William Henry Thorne, Henry Thompson and Benjamin Parsons executors in trust. He then declared :

(1) "In the first place I direct the payment of all my just debts and other expenses, if any, that may be due from me at my death in the Province of Canada West."

(2) "I give, devise and bequeath my mill, tannery, houses, *money and securities for money*, lands, and all my real estate, effects and property whatsoever and of what nature and kind soever *as well real as personal* at Holland Landing in the Province of Canada West aforesaid to my nephew William Henry Thorne, his heirs, executors, administrators and assigns absolutely, but charged and chargeable nevertheless with, and I hereby charge the said Holland Landing property with, the payment of the annuities and legacies next hereinafter mentioned," namely, an annuity of $800 to his wife, Patience Margaret Ann Thorne, for life to be paid by his nephew William Henry Thorne "out of such property" in pursuance and in confirmation of a deed or covenant made previously to and in contemplation of marriage with his said wife.

(3) And in further confirmation of the aforesaid deed or covenant he gave and bequeathed to his said wife one other annuity of $800 for life to be paid "from out of my general estate, effects and property at Toronto and elsewhere in the Province of Canada West aforesaid (but I hereby except my said property at Holland Landing aforesaid from the payment of any portion of such last mentioned annuity to my said wife as well as my personal estate, money and securities for money at Holland Landing aforesaid) such last mentioned annuity to be paid to her half-yearly out of my said general estate at Toronto by the trustees and executors of this my will."

(4) "And I hereby charge my property, estate and effects at Holland Landing aforesaid with the payment of the sums of money next hereinafter mentioned, that is to say, namely, $200, as per covenant, to the clergyman of the church at Holland Landing aforesaid; $200 per annum by equal half-yearly payments to my niece Anna Maria Thorne, and $200 per annum to my niece Catharine Thorne by equal half-yearly payments, and $200 per annum by likewise half-yearly payments to my nephew Alfred Thorne."

(5) "I give to my sister Susannah, the wife of William Parsons, the elder, of Thornhill, in the Province of Canada

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West, the interest, after the current rate of interest paid in Canada West, on the principal sum of $2500, which sum is now due to me from the late William Parsons, the elder; and, after the decease of my said sister, I give and bequeath the said principal sum of $2500 equally between and amongst all the then surviving children of her my last named sister."

(6) "And I hereby charge the whole of the residuary, real and personal estate and effects at Toronto, Canada West, and elsewhere in that Province (except my last named property and effects at Holland Landing aforesaid) with the payment of the legacies or sums of sterling money following to the several legatees next hereinafter named now resident in England and in the Province of Canada West aforesaid, namely," to his nephews Thomas Turner, William Thorne Turner and Benjamin Thorne Turner and to his niece Mary Harman £1500 each, such last mentioned legacy to be held by his trustees upon certain trusts therein declared.

(7) He gave to each of his nephews, Benjamin Thorne, John Mills Thorne and George Burtt a legacy of £1000 sterling apiece, and to his two nieces, Caroline Elizabeth Ann, the wife of John George Bonner, and Emily, the wife of the Reverend Gordon Calthrope, a legacy of £500 each. To the following nephews and nieces the legacies following, viz.: To Benjamin John Thorne, Benjamin Parsons and Henry Thompson, $4000 each; to Richard Thorne, Horace Thorne and Charles Thorne, $2000 each; to Walter Strickland Thompson, Jane, the wife of the Reverend William Stewart Darling, Harriett, the wife of the Reverend Henry Osler, Mary Wilcocks, widow of his friend Alfred Henry Venner, $1000 each; to John Parsons, $500, and to Charles Parsons, $1500, and to his nieces Fanny Parsons and Emma Parsons, $200 each per annum.

(8) He also bequeathed to his trustees the sum of $2000 to be raised out of his general residuary estate and effects when and as they might think fit to be divided and distributed amongst such charities in Canada West aforesaid, and in such shares and proportions as they in their discretion should think best and most deserving of such help.

(9) And as to the legacies thereby bequeathed to his said nieces Anna Maria Thorne and Catharine Thorne, Fanny

Parsons and Emma Parsons, he authorized and directed his trustees and the survivor or survivors of them in the event of their marriage to cause the same to be settled to her and their separate use, etc. "And as to the several legacies hereinbefore bequeathed to my said nephews and nieces, and which are charged by me on my estates, lands, moneys and securities for money at Holland Landing, Toronto, and elsewhere in the Province of Canada West aforesaid," he directed that the said trustees should pay the same legacies over to the respective legatees as the same might be collected and otherwise fall in from his properties and other securities there, and that until paid off such legatees should be entitled to interest payable half-yearly at the rate of interest payable in Canada West. "And I further declare that it is my wish and desire that no legatee hereunder receiving such current rate of interest as aforesaid shall be entitled to call for the full payment of the legacy bequeathed to him or her before the expiration of seven years after my decease, unless he or she shall have received six months' notice in writing from my trustees, or the major part of them, before the expiration of such period of seven years, stating it to be the wish and intention of such trustees to pay off, at such earlier period as may be named in such notice to the legatee or legatees to whom such notice shall be addressed, the legacies hereby bequeathed to him, her, or them respectively. And as to all the rest, residue and remainder of my estate, effects and property wheresoever, whatsoever, and of what nature or kind soever in Canada West aforesaid, I give, devise and bequeath the same unto and equally between and amongst the said William Parsons, John Mills Thorne, George Burtt, William Henry Thorne, Henry Thompson and Benjamin Parsons, their heirs, executors, administrators and assigns absolutely. And I appoint them whole and sole executors in trust of this my will."

(10) And I give, devise and bequeath unto the said William Parsons, John Mills Thorne, George Burt, William Henry Thorne, Henry Thompson and Benjamin Parsons, their heirs, executors, administrators and assigns, all the estates in the Province of Canada West aforesaid, which may be vested in me upon any trust, or by way of mortgage, upon trust to hold and dispose of such estates subject to the equities affecting the

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same respectively; and I hereby authorize and empower the trustees or trustee for the time being of this my will to sell by public auction or private contract, and to call in and convert into money, any part of my real and personal estate, not consisting of ready money, at Toronto or elsewhere in Canada West (except Holland Landing aforesaid) in such manner and at such times as they or he may think fit and to enable them the more easily and effectually to carry out my directions in this respect."

An action having been brought by the plaintiff claiming an injunction restraining the defendant John Mills Thorne, the surviving executor and trustee under the will, from interfering or meddling with the assets of the estate, in the course of the proceedings there was a reference to the Master who found as follows:—

June 4, 1900. THE MASTER IN ORDINARY:—1. I think the will is reasonably clear as to the intention of the testator. First, he says: "I give, devise and bequeath my mill, tannery, houses, lands, and all my real estate and property whatsoever, and of what nature or kind soever, at Holland Landing in the Province of Canada West aforesaid, to my nephew William Henry Thorne, his heirs, executors, administrators and assigns absolutely."

2. It was not necessary for him after using the words, "My mill, tannery, houses, lands," to add "and all my real estate;" but he has added them, together with other words, "and property whatsoever and of what nature or kind soever at Holland Landing, Canada West." These words, "property whatsoever and of what nature or kind soever," include both real and personal estate.

3. Then, further on in the same clause, he gives a second annuity of $800 a year to his wife, and adds: "I hereby except my said property at Holland Landing aforesaid from the payment of any portion of such last mentioned annuity to my said wife, as well as my personal estate, money and securities for money also at Holland Landing aforesaid," which must be read as if he had worded it: "I hereby except my said property, as well as my personal estate, money and

securities for money, at Holland Landing aforesaid, from the payment of any portion of the last mentioned annuity to my said wife."

4. Then referring back to the first clause his words are: "I hereby charge the said Holland Landing property with the payment of the annuities and legacies next hereinafter mentioned, namely, one annuity or yearly sum of $800, to be paid by my said nephew William Henry Thorne out of such property to my wife Patience Margaret Ann Thorne."

And then we find a further direction in the next paragraph of his will: "And I hereby charge my property, estate and effects at Holland Landing aforesaid with the payment of the sums of money next hereinafter mentioned, that is to say, $200 per annum by half-yearly payments to my niece Anna Maria Thorne; $200 per annum to my niece Catharine Thorne by half-yearly payments; and $200 per annum by like half-yearly payments to my nephew Alfred Thorne."

Now I think the intention of the testator from these expressions was to charge all the Holland Landing property and the assets there with the payment of the annuities and legacies mentioned in his will, one of $800 to his wife, $200 as per covenant to the clergyman of the church at Holland Landing, $200 to his niece Anna Maria Thorne, and $200 to his niece Catharine Thorne. But these are not the only clauses which help to ascertain the testator's intention respecting his property at Holland Landing, for in another paragraph he says: "And I hereby charge the whole of my residuary real and personal estate at Toronto, Canada West, and elsewhere in that Province (except my last named property and effects at Holland Landing aforesaid)" with the payment of certain legacies.

5. There is also a general direction in regard to the payment of legacies charged on the estates, lands, monies, and securities for money, in which the property at Holland Landing is specially designated as being apart from the estates, lands, moneys, and securities for money at Toronto and elsewhere in the Province of Canada West. Further on there is a clause which vests the general estate in the trustees, with this direction: "And I hereby authorize and empower the trustees or trustee for the time being of this my will to sell by public auction

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or private contract, and to call in and convert into money, any part of my real and personal estate not consisting of ready money at Toronto or elsewhere in Canada West (except Holland Landing aforesaid)," which would also indicate that these Holland Landing properties and assets are not to form part of his general estate.

6. I must therefore find that throughout the will the testator treats all these properties, real and personal, at Holland Landing as a special estate, which he devises to his nephew William Henry Thorne, and he charges them with the legacies of $800 to his widow and $200 a year to each of his nieces.

The learned Master then certified that a certain open account amounting to some $18,000 due by W. H. Thorne and B. J. Thorne to the testator at the time of his death passed by the second paragraph of the will to the said W. H. Thorne.

From this judgment the plaintiff J. M. Thorne, and the defendants, other than Horace Thorne, W. H. Thorne, Anna Maria Thorne, and Catherine Thorne, appealed to the Divisional Court.

The plaintiff W. H. Thorne did not appeal and was made a respondent.

On March 8th, the appeal was argued before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., and STREET, J.

S. H. Blake, K.C., and *Dyce Saunders*, for the appellants.

D. O. Cameron, for the respondent Horace Thorne.

T. J. Blain, for the respondents Anna Maria Thorne and Catharine Thorne.

W. T. J. Lee, for the respondent W. H. Thorne.

April 15, 1901. STREET, J.:—The testator William Thorne had his domicile in England at the time of his death, but spent much of his time in the Province of Ontario, where he was a partner in a leather business carried on in Toronto. He owned a mill and a tannery at Holland Landing, which he had for several years leased to his nephews William Henry Thorne and B. J. Thorne. They were indebted to him at the time of the making of his will in a large amount for arrears of rent and for moneys advanced by him to them, all of which stood in the

form of an open account upon their books, and was not represented by any note or other security. This debt was much increased at the time of his death. He spent a good deal of his time at Holland Landing, making it his home while he was in Canada, and he lived when there in rooms of his own which he had furnished; he also kept wines for his own use there. From time to time he made additions in the way of machinery and buildings to the tannery and mill, and the bricks, lumber, etc., for the additions were sent to the premises by him. He had no bank account there, and kept none of his securities there.

William Henry Thorne was one of his executors, and, after the death of the testator in 1868, he accepted as a proper interpretation of the will that he and B. J. Thorne were not relieved by it from the payment of the debt due by them to the testator in his lifetime, and that the gift to him did not include this debt. They gave notes for the amount of it after his death to the estate, and secured it further by a mortgage upon the mills and tannery at Holland Landing, and paid large sums by way of principal and interest upon it down to 1873, when they failed in business, and nothing more was recoverable from them or the property which fell into decay.

It is now contended on the part of the defendants, and the Master in Ordinary has decided in favour of the contention, that the testator by his will gave to his nephew W. H. Thorne the debt due by him and B. J. Thorne to the testator at the time of his death, subject to the legacies, etc., to which the gift to W. H. Thorne is declared to be subject; and this is an appeal against that decision.

The question to be determined is whether the debt in question passed under the gift to W. H. Thorne, or whether it formed part of the residuary estate.

In my opinion the determination of this question does not depend upon the matter of law which was so fully argued before us, viz., the circumstances under which a chose in action of this nature is to be treated as having a locality, but upon the construction to be placed as a matter of ordinary interpretation upon a very few short sentences of the English language, aided to some extent by their surroundings.

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For the sake of a more convenient reference to the will in question I have divided it into numbered paragraphs. The scheme of paragraphs (2) and (4) is to give to W. H. Thorne certain property at Holland Landing charged with an annuity of $800 to the testator's widow, with a legacy of $200 to the clergyman at Holland Landing, and with annuities of $200 each to the two nieces and a nephew. It is true that the legacy and annuities in the fourth paragraph are not entirely within the description in the second paragraph of the annuities and "legacies next hereinafter mentioned," because a second annuity of $800 to the widow, which is not charged upon any property at Holland Landing, is interposed; but I think the only reasonable mode of construing these clauses is to treat the second legacy of $800 to the widow as having been inserted by way of parenthesis. As there is no necessity of treating the words "my property, estate and effects at Holland Landing aforesaid" in the fourth paragraph as being intended to cover any property other than that given to W. H. Thorne in the second paragraph, the interpretation of the second and fourth paragraphs will, as I have said, be that the testator intended to give to W. H. Thorne the property covered by the second paragraph, subject to the payments mentioned in the second and fourth paragraphs, and to charge the whole of these payments only on the property given to W. H. Thorne and not in whole or in part upon property which was not given to him.

This brings us down to the neat question of what passed to him under the language used by the testator in the second paragraph, "my mill, tannery, houses, lands and all my real estate and property whatsoever and of what nature or kind soever at Holland Landing."

I think it is plain that the language here used is capable of being construed according to the presence or absence of a context in either of two ways. If, for instance, it stood alone without any residuary bequest, it would be treated as meaning "all my real estate (and all my) property whatsoever and of what nature or kind soever at Holland Landing," and as covering the testator's estate both real and personal. On the other hand, if it were followed by a gift of all the testator's personal property the words used in it are capable of being construed as

applying only to real estate. In the third paragraph of this will, however, the testator has used language which seems to me conclusive as to the meaning which he intended to attach to that he had just used in his gift to W. H. Thorne. After giving to his widow the second annuity of $800 during her life, to be paid to her out of his general estate in this Province, he proceeds to exempt from that which is to be chargeable with this annuity all his property at Holland Landing, in the following words: "but I hereby except my said property at Holland Landing aforesaid" (that is the property given to W. H. Thorne) "from the payment of any portion of such last mentioned annuity to my said wife, as well as my personal estate, money, and securities for money also at Holland Landing aforesaid." In this sentence he plainly separates his property at Holland Landing into two parts, one of them being all that he had just given to W. H. Thorne, and the other consisting of his personal estate, money, and securities for money at Holland Landing. He has almost in so many words said, "The property at Holland Landing which I have given to my nephew does not include my personal estate, monies and securities for money at Holland Landing, and therefore I make a special exception of the latter having already excepted the former."

The expression which I have quoted from the third paragraph of the will beginning "as well as" seems to me to be the key note to the interpretation of the loose and general expressions in the second and fourth paragraphs by which the subject matter of the gift to W. H. Thorne is described, and to afford a thoroughly safe guide to the testator's meaning. As I have pointed out, the words in the second paragraph, "the annuities and legacies next hereinafter mentioned," require, in order that they may not include the second legacy to the widow in their terms, that the third paragraph should, as a matter of construction of the second and fourth paragraphs, be omitted from its position in the will and should not be read as coming in between the second and fourth paragraphs. The general words in the fourth paragraph, "my property, estate and effects at Holland Landing aforesaid," then easily refer to and include only the subject matter of the

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gift to W. H. Thorne, an interpretation in accord with the general scheme of the will.

Again, in the sixth paragraph the testator shews that he is carrying on his expressed idea of a division into two parts of his property at Holland Landing, for he charges the whole of his residuary real and personal estate and effects in the Province, except his "last named property and effects at Holland Landing aforesaid," with certain legacies; his "last named" property and effects at Holland Landing being that mentioned in the fourth paragraph, in other words, the property given to W. H. Thorne by the second paragraph.

In the eighth paragraph of the will the testator seems to be under the impression that he has given legacies instead of annuities to the two nieces mentioned in the fourth paragraph, and gives directions to his trustees which seem entirely inapplicable to the benefits given them by the will.

The provision in the ninth paragraph in which his property at Holland Landing, Toronto, and elsewhere is referred to in general terms does not affect the construction in any way, nor does the reference to the Holland Landing property in the tenth paragraph throw any further light on the subject.

If an explanation is needed as to the meaning to be given under the construction which I have adopted of the words "all my real estate and property whatsoever and of what nature or kind soever at Holland Landing," I think it may be found in the fact which appears in the accounts on file in the Master's office, viz., that the testator in his lifetime was frequently making additions in the shape of machinery, fixtures, and buildings to his mill and tannery at Holland Landing, and that the general words following the gift of his real estate there were intended to cover not only that which was undoubtedly real estate but the machinery, fixtures, and moveable parts of the buildings.

For the reasons which I have given I think it should be declared that the gift to W. H. Thorne did not pass to him the debt due the testator by him and B. J. Thorne, and that the appeal should be allowed with costs.

From this judgment the defendants appealed to the Court of Appeal.

On December 13th, 1901, the appeal was argued before MACLENNAN, J.A., MEREDITH, C.J.C.P., and MOSS, and LISTER, JJ.A.

D. O. Cameron, for the appellant Horace Thorne. The real and personal property at Holland Landing passed under the devise in question. The use of the word "property" as well as the words "real estate" shews that something in addition to the real estate was intended, while the word "property" includes personal property. The form of the bequest is "devise and bequeath," and while "devise" is applicable to a gift of real estate, "bequeath" is applicable to a gift of personal estate: *Arnold* v. *Arnold* (1835), 2 My. & K. 365; *Earl of Tyrone* v. *Marquis of Waterford* (1860), 1 DeG. F. & J. 613; *Nisbett* v. *Murray* (1799), 5 Ves. 149; *Guthrie* v. *Walrond* (1883), 22 Ch. D. 573; *Re Prater Desinge* v. *Beare* (1887), 36 Ch. D. 473; (1888), 37 Ch. D. 481; *Re Robson, Robson* v. *Hamilton,* [1891] 2 Ch. 559; *Coard* v. *Holderness* (1855), 24 L.J.N.S. Ch. 388; Elphinstone on Deeds, 6th ed., p. 443. The context shews that the personal estate passed. The arrears of rent and money advanced for carrying on the business at Holland Landing formed part of the Holland Landing property. The gift being of property in a particular locality constituted the only property of any value there, and if the testator intended to except the personal property from the gift he would have done so expressly. When the testator made the first legacy to his wife and the other legacies a charge on the Holland Landing property, he had in view this personal property out of which they might be payable. It is difficult to conceive that the testator intended that the devisees should pay the arrears of rent and money advanced in addition to the legacies. When he gives the second legacy to his wife he expressly excepts the Holland Landing property, and makes that legacy a charge on his general estate. Then, in dealing with the residuary estate, he expressly excepts his "property and effects" at Holland Landing, thus shewing that he considered that the property and effects there had already been disposed of. Then also in the trust for sale, the real and personal property at Holland Landing is excepted. The will bears evidence

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of having been drawn by a solicitor, and so viewed, it must be considered that the solicitor when using the words appropriate to pass real and personal estate did so intentionally. The onus of proof is on the executors to shew that something different from the ordinary meaning of the words used was intended: *Henning* v. *McLean* (1901), 2 O.L.R. 169; Jarman on Wills, 6th ed., 436. The *ejusdem generis* rule does not apply here: *Ringer* v. *Cann* (1838), 3 M. & W. 343; *Jones* v. *Robinson* (1878), 3 C.P.D. 344; *Regina* v. *Payne* (1866), L.R. 1 C.C. 26. The matter being one of doubtful construction, the plaintiff should have his costs out of the estate: *Singleton* v. *Tomlinson* (1878), 3 App. Cas. 404; *Mitchell* v. *Gard* (1862), 3 Sw. & Tr. 75. The deleted words in the will do not in any way affect the construction contended for by the appellants; but in any event, if they should do so, they should not affect the question of costs, as this was not brought to the appellant's notice until the case was in appeal.

T. J. Blain, for the appellants Anna Maria Thorne and Catharine Thorne. These appellants are legatees, and have not been paid any part of their legacies. They are, in any event, entitled to be paid out of this fund after the death of the testator's wife and his nieces Fanny and Emma Parsons, otherwise the corpus left after their death would go to the executors and trustees as residuary legatees, and the result would be that the residuary legatees would be preferred to the specific legatees, and notwithstanding that in their capacity of executors they have been guilty of laches and breaches of trust. These appellants are in the same interest as the appellant Horace Thorne, and therefore the argument on his behalf applies to them, and they should also have their costs out of the estate.

W. T. J. Lee, for the respondent W. H. Thorne, the surviving executor. W. H. Thorne is merely in the position of trustee, and abides by the decision of the Court, and is entitled to be paid his costs out of the estate, and costs should not have been imposed upon him by the Divisional Court: *Re Knight's Will* (1884), 26 Ch. D. 82; *Re Love, Hill* v. *Spurgeon* (1885), 29 Ch. D. 348.

S. H. Blake, K.C., and *Dyce Saunders*, for the other respondents. On the death of the testator, the will was construed by the executor under advice of counsel, as it has been construed by the Divisional Court, viz., that the devise was limited to the real property at Holland Landing, and did not include personal property; in any event, it would not include the debts and arrears of rent, which are choses in action and have no locality. This is the proper construction to put on the words used: *Fleming* v. *Brook* (1804), 1 Sch. & Lef. 318; *Moore* v. *Moore* (1781), 1 Bro. C.C. 127; *Marquis of Hertford* v. *Lord Lowther* (1843), 7 Beav. 1; *Brooke* v. *Turner* (1836), 7 Sim. 671. The Court must put itself in the position of the testator when he was making his will, and it must be borne in mind that he always spoke of the mill and tannery as his "Thornhill property." It was then a flourishing concern, and considered well able to bear the liabilities imposed upon it, and also to pay the legacies charged on it. The amount of the indebtedness at the testator's death was some $18,000, while W. H. Thorne also had a letter of credit from the testator of $30,000, so that if he had drawn against it to the full amount, this, under the appellants' contention, would have passed to him. In view of the careful division of his estate made by the testator, the presumption is against his so depleting his general estate, and increasing the gift to W. H. Thorne by so large a sum. But, as pointed out by Street, J., in giving the judgment of the Divisional Court, on reading the other clauses of the will, the context shews the devise is limited to the real estate. The deleted words in the original will may be looked at to shew the testator's intention, and that they shew that the testator's intention was to limit the devise to the real property: Hawkins on Wills, 2nd Am. ed., secs. 8, 55; *Manning* v. *Purcell* (1855), 7 DeG. M. & G. 55; *Swinton* v. *Bailey* (1878), 4 App. Cas. 70; *Re Harrison, Turner* v. *Hellard* (1885), 30 Ch. D. 390; *Gaskin* v. *Rogers* (1866), L.R. 2 Eq. 284; Jarman on Wills, 6th ed., vol. 1, p. 30; *Hotham* v. *Sutton* (1808), 15 Ves. 319; *Brooke* v. *Turner*, 7 Sim. 671, 681. The *ejusdem generis* rule applies, and limits the word "property" to real estate: *Doe d. Haw* v. *Earles* (1846), 15 M. & W. 450; *Rhodes* v. *Rhodes* (1882), 7 App. Cas. 192; *Re Jodrell*,

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Jodrell v. *Seale* (1889), 44 Ch. D. 590; Jarman on Wills, 6th ed., p. 137; *Campbell* v. *McGrain* (1857), 9 Ir. Eq. 397; *Northey* v. *Paxton* (1889), 60 L.T.N.S. 30; *Re Miller, Daniel* v. *Daniel* (1889), 60 L.T.N.S. 365. In any event, W. H. Thorne would be barred by acquiescence and laches.

September 19. MACLENNAN, J.A.:—I am of opinion that this appeal should be dismissed.

There is no doubt whatever that the original will may be looked at on a question of its construction. That is decided by many cases. It was, however, contended that the deleted words could be looked at to support the inference that the testator did not intend to include his choses in action at Holland Landing in the gift to W. H. Thorne. I think the contrary of that is decided by the House of Lords in *Inglis* v. *Buttery* (1878), 3 App. Cas. 552, the reasons for the decision in that case being as applicable to a will as to a contract *inter partes.*

In my opinion, however, the gift is confined to the real estate at Holland Landing by the terms of the gift itself.

The words are: "I give, devise, and bequeath my mill, tannery, houses, lands, and all my real estate and property whatsoever at Holland Landing . . . to my nephew William Henry Thorne, his heirs, executors, administrators and assigns absolutely, but charged and chargeable with the payment of the annuities and legacies next hereinafter mentioned, namely," etc. I think that upon the fair grammatical construction of those words, "real estate and property" mean "real estate and real property," the words "estate" and "property" being both qualified by the word "real." I think the conclusion would be the same if the word "real" had been wholly omitted, on the principle of *ejusdem generis.*

If, however, the point had been doubtful on the words of the gift, it is made clear by a consideration of the other parts of the will, as shewn by the judgment of the Divisional Court, and in that of my brother Moss.

I do not think W. H. Thorne can be relieved of the costs given against him in the Divisional Court.

MOSS, J.A.:—The original judgment in this action contained, amongst other provisions, a reference to the Master in Ordinary to pass the accounts of the dealings of the executors and trustees named in the will of the testator William Thorne with the estate which came to their hands, and to fix their compensation.

In proceeding with the reference the Master in Ordinary found that certain persons, including Horace Thorne, Anna Maria Thorne and Catharine Thorne, should be enabled to attend the proceedings, and he therefore caused them to be served, and thereafter they were treated and named as parties defendants in accordance with the Consolidated Rules.

Horace Thorne, Anna Maria Thorne and Catharine Thorne did thereafter attend the proceedings in the Master's office, and filed surcharges and objections to the accounts filed by the executors and trustees. Among other objections they sought to surcharge the executors and trustees with the amount of certain moneys said to have been received on account of an indebtedness owing to the testator by the partnership firm of W. H. & B. J. Thorne, which consisted of William Henry Thorne and Benjamin J. Thorne, who at the time of the making of the will and of the testator's death were carrying on business at Holland Landing as tanners and otherwise, on premises owned by the testator.

The surcharging parties are the persons now entitled to certain annuities, the payment of which was charged upon that part of the property of the testator at Holland Landing which passed under the will to William Henry Thorne; and the contention of the surcharging parties before the Master was that the indebtedness of the firm of W. H. & B. J. Thorne was part of the testator's property which did pass to William Henry Thorne. Their contention was upheld by the learned Master, but upon appeal to a Divisional Court by the plaintiff John Mills Thorne and the defendants adverse in interest to the surcharging parties, the Master's ruling was reversed.

The opinion of the Court, wherein the material facts are fully stated, was delivered by Street, J.

From this judgment the surcharging parties appealed to this Court. The plaintiff W. H. Thorne, who did not join in the

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appeal to the Divisional Court and was therefore made a respondent and was included with the other respondents in the order of the Divisional Court for payment of the costs of that appeal, appeared on the argument of the appeal to this Court and complained that he was improperly charged with such costs.

Upon the main question I see no reason to differ from the Divisional Court. The words of gift to W. H. Thorne are: "My mill, tannery, houses, lands and all my real estate and property whatsoever, and of what nature or kind soever at Holland Landing." Undoubtedly these words if left to their ordinary signification uncontrolled by context are wide enough to include personal property and effects, and even a debt owing to the testator in respect of property owned by him at Holland Landing.

The question, in a case of this kind, is whether it was the intention of the testator to include book debts in the gift, and this must be discovered by reading the whole will.

In *Horsfield* v. *Ashton* (1856), 2 Jur. N.S. 153, at p. 195, Lord Cranworth said: "For though the book debts, money and capital in the trade could not be properly described as personal estate situate at Hyde or Werneth, (for property of this description has in strictness no locality), yet the question is in what sense the testator used these words?"

In the case *Re Prater Designe* v. *Beare*, 37 Ch. D. 481, at p. 486, Cotton, L.J., said: "There are cases where a gift of property in a particular locality has been held to include debts due from persons in that locality. I think these latter cases go upon this—that there was in the wills a sufficient indication of intention to include under the description of property in a particular place that which really cannot have any locality. Those cases, in my opinion, shew that the rule that choses in action have no locality must not deter us from holding them to be included in a gift of property in a particular locality, if we come to the conclusion that the intention of the testator was so to include them."

And in regard to the word "property" Lord Justice Turner said in *Earl Tyrone* v. *Marquis of Waterford*, 1 DeG. F. & J. 613, at p. 631: "The word property . . . has an extensive

signification, and must have its full effect unless controlled by the context."

But in the will before us there is much in the context to control the ordinarily extensive signification of the words employed in the gift to W. H. Thorne, and to shew that it was not the testator's intention to give him more than the real property and property savouring of the realty. Much stress has been laid on the many general words following the descriptive words in the devise, and it was argued that the doctrine of *ejusdem generis* is not to be applied. But the cases shew that where there is found the intention to deal with property referred to as being in a particular locality, the necessity is no longer felt of giving effect to all those general words which follow the enumeration of the particulars. This was pronounced by Kekewich, J., in *Northey* v. *Paxton*, 60 L.T.N.S. at p. 31, to be the real principle and to be equally applicable whether the enumeration is slender or otherwise, provided, of course, that the context and the circumstances generally, allow of the application.

The provisions which follow the words of gift to W. H. Thorne contain more than one reference to the testator's property at Holland Landing which might be considered as equally applicable whether the testator intended both real and personal property, or only the former, to be included. But, as pointed out by Street, J., the clause which he terms the third paragraph of the will makes distinct separation between the two kinds of property, and plainly indicates that the personal estate, money, and securities for money were not given to W. H. Thorne. In that paragraph the testator was making a provision for an annuity to his wife to be charged upon his general estate, except his property at Holland Landing; and if he intended or supposed that it had been all given to W. H. Thorne by what Street, J., terms the second paragraph of the will, it would have been sufficient for him to have said, "But I hereby except my said property at Holland Landing aforesaid from the payment of any portion of such last mentioned annuity to my said wife," and stopped there. But he proceeds, "as well as my personal estate, money, and securities for money also at Holland Landing

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aforesaid." This makes it plain that by the words "my said property at Holland Landing aforesaid" he did not intend to include his personal estate, money, and securities for money at Holland Landing.

Referring again to what has been termed the second paragraph, it is manifest that the testator intended to charge the property he was giving to W. H. Thorne with the payment of certain annuities and legacies. He says, "I hereby charge the said Holland Landing property," that is the Holland Landing property he had just given to W. H. Thorne. Then in the exception in what has been termed the third paragraph he uses not quite but substantially the same expression, viz., "my said property at Holland Landing aforesaid," and so again indicates the property he had given to W. H. Thorne. Then follow the words already quoted, which interpret the foregoing words as not including the personal estate, money, and securities for money at Holland Landing. And this construction leads to the exclusion of any claim of W. H. Thorne to the book debts in question.

I have arrived at this conclusion without reference to the appearance of the original will. If we are at liberty to look at it for the purposes of construction—as to which see *Child* v. *Ellsworth* (1852), 2 DeG. M. & G. 679, at p. 683; *Manning* v. *Purcell*, 7 DeG. M. & G. 55; *Gauntlett* v. *Carter* (1853), 17 Beav. 586, at p. 590; *Swinton* v. *Bailey*, 4 App. Cas. 70; *Re Harrison, Turner* v. *Hellard*, 30 Ch. D. 390 — an inspection of what has been termed the second paragraph lends support to the view that the testator's intention was not to include in the gift to W. H. Thorne the personal estate, moneys, and securities for money at Holland Landing.

As to the order for costs against the plaintiff W. H. Thorne, counsel appeared for him before the Divisional Court and was heard in opposition to the appeal. He appears not to have contented himself with submitting his rights as a trustee, but to have actively intervened as a contestant. He seems to have made common cause with the other respondents, and for this reason was included with them in the order for costs.

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The appeal should be dismissed.

MEREDITH, C.J., concurred.

LISTER, J.A., died before judgment was delivered.

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[DIVISIONAL COURT.]

ABBOTT v. THE ATLANTIC REFINING CO.

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Oct. 27.

Contract — Husband as Agent for Wife — Guarantee—Breach — Evidence of Husband's Agency—Damages—Privity.

A husband who was superintending the erection of a building for his wife on her property, after correspondence with defendants who had made a proposal to construct the roof and in which the building was referred to by them as "your building" and by him as "my building," took a guarantee from them that "your roof . . . will remain water proof." The wife was not mentioned.

In an action by the husband and wife for damages for defects in the roof, and for injury to some property in the house belonging to the husband :—

Held, that the expressions employed did not necessarily imply that the husband was the owner of the roof or the building, but were used as conveniently descriptive of the matter under discussion and that it was competent for the wife to give evidence that he was her agent and to recover damages for breach of the contract.

Held, also, that the husband not being either a party or privy to the contract could not recover for its breach.

Lucas v. *De la Cour* (1813), 1 M. & S. 249, and *Humble* v. *Hunter* (1848), 12 Q.B. 310, referred to and distinguished.

THIS was an appeal by the defendants from the county court of the county of Simcoe.

The following facts are taken from the judgment of Street, J., in the Divisional Court :—

The present action was originally brought by the husband, George A. Abbott, alone, upon a guarantee by the defendants that a roof completed by them upon a new building belonging to the female plaintiff, Mary S. Abbott, would remain waterproof for five years, and an agreement that in case of its leaking within that time they would repair it at their own expense.

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The defendants in their proposal to George A. Abbott to construct the roof to the building in question, spoke of the building as "your building," and in his reply, he spoke of it as "my building."

In the guarantee the defendants, addressing George A. Abbott alone, wrote: "We hereby guarantee that *your* roof, completed under instructions from us by Mr. S. D. Eplett of *your* town, will remain waterproof for a period of five years from date. In the event of said roof leaking at any time within the above mentioned time, we hereby agree to repair same at our expense."

The roof was completed, and after the guarantee had been given, the building was for the first time occupied. The plaintiff, George A. Abbott, occupied part of it, as tenant to his wife, as a barber shop; she occupied another part for the purposes of a shop; he and she together occupied another part as a dwelling; and she rented a large room in it as a public hall.

The roof proved defective and the wet came through it; the defendants were notified and attempted to repair it, but without success, and finally a new roof was necessary.

The building itself, and some chattel property in it belonging to the husband, and other property belonging to the wife, were damaged.

The plaintiff, George A. Abbott, brought the present action, and the record was entered for trial in that form, but upon an application being made by his counsel to the Judge presiding at the Court, he made an order that Mary A. Abbott, the wife of George A. Abbott, should be added as a co-plaintiff.

She was thereupon added, new pleadings were delivered, and the action in its amended form was tried without a jury before the junior Judge of the county court of Simcoe.

After consideration, he gave judgment in favour of both plaintiffs for $200, leaving them to divide it as they might think proper; or, if they could not agree upon a division, then one-third to the husband and two-thirds to the wife, with costs of the action upon the county court scale, Mrs. Abbott's costs being limited to the time she became a party.

The defendants appealed to a Divisional Court from this judgment upon the following amongst other grounds: that the admission of evidence that George A. Abbott acted as agent for his wife was improper, because the contract was in writing, and shewed on its face that he was acting as principal: that his agency was not in fact proved: that no damages should have been given to George A. Abbott: that the evidence shewed that the leaking of the roof was due to other causes than the defendants' work: that it was improper to allow the plaintiffs to divide the damages between them: that the damages to the building and the chattel property are too remote: that the only damages recoverable under the guarantee are the cost of repairs: and that there was no sufficient memorandum of the contract to satisfy the Statute of Frauds.

The appeal was argued on September 11th, 1902, before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., and STREET and BRITTON, JJ.

W. M. Boultbee, for the appeal. The wife has no status in this action and the husband is not damaged. The judgment is uncertain in allowing the amount "to be divided as they may agree." If the husband claims as agent for the wife, evidence cannot be received to shew an undisclosed principal: *Humble* v. *Hunter* (1848), 12 Q.B. 310, approved of in all the recent text books: Wright on Principal and Agent, 2nd ed., p. 340 *et seq.*; Anson on Contracts, 8th ed., p. 351. The guarantee called for notice, and the defendants are not liable except for damages incurred by neglect to repair after notice: *Makin* v. *Watkinson* (1870), L.R. 6 Ex. 25.

J. C. Brokovski, contra. The evidence shews ample notice and ample time in which to do the repairs. It is not necessary that the principal's name should appear at all during the transaction: *McCarthy* v. *Cooper* (1884), 8 O.R. 316, at p. 326, (1885), 12 A.R. 284; *McClung* v. *McCraken* (1883), 3 O.R. 596, *per* Hagarty, C.J., at p. 600; *Davidson* v. *McClelland* (1900), 32 O.R. 382; *Keighley, Maxsted & Co.* v. *Durant*, [1901] A.C. 240, at p. 250. The husband had the right to sue, the contract, being for the mutual benefit of the husband and

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wife: *Lee* v. *Hopkins* (1890), 20 O.R. 666. The wife is entitled to the benefit of a judgment recovered in the name of her agent: *Mollett* v. *Robinson* (1872), L.R. 7 C.P. 84, at p. 119; *Armstrong* v. *Stokes* (1872), L.R. 7 Q.B. 598, at p. 604. I refer also to *Christoffersen* v. *Hansen* (1872), L.R. 7 Q.B. 509, at p. 513; Wright on Principal and Agent, 2nd ed., 176, 177; *Hopkins* v. *Great Eastern R.W. Co.* (1896), 60 J.P. 86; *Stretton* v. *Holmes* (1890), 19 O.R. 286.

Boultbee, in reply.

October 27. STREET, J.:—Mrs. Abbott was erecting the building in question upon her own land for herself; her husband was acting as her agent in making the contracts for its erection, and superintending the work done on her behalf, but had no personal interest in it.

The defendants became aware that a roof was to be put on, and wrote the husband that in order to introduce their roofing material into "your town," they would put on "your roof" for a fixed price. To this he replied in his own name, accepting their offer to put on "my roof"; and thereupon they gave the guarantee now sued on, in which they refer to the roof as "your roof"; again, as it happens, also speaking in the same sentence, of "your town."

It is argued that to permit evidence shewing that the husband was acting merely as agent for the wife would be to allow him to contradict the writings in which he describes the roof as his.

The case certainly comes very near to the decisions of *Lucas* v. *De la Cour* (1813), 1 M. & S. 249, and *Humble* v. *Hunter*, 12 Q.B. 310, but I do not think it comes within them.

In *Lucas* v. *De la Cour* there was an absolute statement that the goods in the question were the sole property of one partner, and that he had acquired the interest of his co-partners in them, and it was held that this statement prevented them from asserting a joint ownership as against the other party to the contract.

In *Humble* v. *Hunter* there was a written statement on the face of the charter party that the plaintiff's son was "owner" of the good ship *Ann*, and it was held that the plaintiff could

not, in an action for freight and demurrage under the charter party, give evidence that she, and not her son, was "owner" of the vessel, and that he had only entered into the contract as her agent.

In the present case, which is brought for damages upon an executed contract, there is no unambiguous assertion of ownership in the husband. The roof in question is referred to by the defendants in the first place in their letter to him as "your roof," and he refers to it in reply as "my roof;" but these expressions do not necessarily imply the representation on his part that he was owner of the roof or of the building; they seem to be used merely as conveniently descriptive of the subject-matter under discussion. When the defendants in the next line of the correspondence refer to the town in which the husband lived as "your town," it is not to be inferred that they meant to imply that he was the owner of the town; they merely used the expression as meaning the town with which he was at the time connected.

He was managing the erection of this building for his wife at the time, and might, without being taken to assert ownership in it, adopt the defendants' reference to the roof as "your" roof, particularly as the defendants in the same letter use the word "your" in the other sense. Therefore, I think it was competent for the wife to shew that her husband had entered into the contract as her agent, and to recover damages from the defendants for the breach of it.

The breach seems to me well established: the roof leaked badly, and in the end became practically almost useless, in spite of the defendants' efforts to repair it. I do not see why the damages should be confined to the cost of repairs of the roof. It was well within the contemplation of the parties that if the roof leaked the building and its walls and its contents would suffer.

No one but a party or privy to the contract could recover for its breach; the husband was neither party nor privy; it was not in contemplation of the parties, so far as appears, that he should have goods there, and he cannot recover, and the action as against him should be dismissed.

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The wife is entitled to recover for the loss of the roof, because she will have to replace it, and for the damage to the walls, carpets, etc. These damages will easily mount up to the sum at which the learned junior Judge has assessed them, namely, $200.

As the result of the appeal, there will therefore be judgment for the plaintiff Mary S. Abbott for $200, with costs from the time she was made a party; and the action, so far as the husband is concerned, will be dismissed with the costs of the defendants as against him down to, but not inclusive, of notice of trial. No costs of the appeal to either party.

FALCONBRIDGE, C.J.:—I agree in the result.

BRITTON, J., concurred.

G. A. B.

[IN CHAMBERS.]

RE MCKENZIE.

1902

Nov. 18.

Will—Construction—Annuities—Creation of Fund for—Right to Resort to Corpus.

The testator by his will made certain specific bequests and devises, and then gave to his executors all the residue of his property, real and personal, in trust to provide means to pay the expenses of administration, to pay debts, and to pay the bequests thereinafter made, with power to the executors to sell lands, etc., "to deposit at interest, lend on security of mortgages, or invest in the Dominion funds, any balance that may be on hand at any time, to form a fund to keep up the yearly payments to my sisters . . namely, to pay to each one of my sisters . . $250 a year, or, if there be not so much available in any year, then to divide equally between them what may be available and make up the deficiency to them when there are funds to do it with, and to pay to any of them who may have greater need on account of ill health or misfortune a greater sum than the others and a greater sum than $250." The will then directed the executors, after sufficient funds had been invested to keep up the payments to the sisters, to pay certain specific sums to four named persons, or in like proportions to each of them, "if there be not enough to pay them in full," and "to pay to the children of my brother . . whatever may remain of the estate:"—

Held, that the sisters of the testator had the right to resort to the corpus of the fund provided for the payment of their annuities, if the income was insufficient.

Re Mason, Mason v. *Robinson* (1878), 8 Ch. D. 411, and *Re Taylor, Illsley* v. *Randall* (1884), 50 L.T.N.S. 717, followed.

MOTION upon an originating notice under Rule 938 by Catharine McKenzie and Isabella Henderson, annuitants thereunder, for an order declaring the construction of the will of William McKenzie, deceased, who died on the 3rd January, 1894, at the village of Morrisburg, having made his last will and testament on the 6th September, 1893.

The testator made specific bequests of money and personal property to relatives and friends, and also devised certain lands in fee to his brother James, to his sisters Isabella Henderson and Janet McKenzie, and to his nephew James McKenzie. These were not involved in the consideration of the questions to be decided.

Then, after devising to his sister Janet a life estate in part of the west half of lot 31 in the 1st concession of the township of Williamsburg, the testator devised the residue of his estate as follows:

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"I give, devise, and bequeath to the executors of this my last will and testament, hereinafter named, the before mentioned part of the west half of lot 31 in the 1st concession of the township of Williamsburg, after the death of my sister Janet McKenzie, and all the residue of my property, real and personal, in trust to provide means to pay the expense of administration, to pay my debts and liabilities, and to pay the bequests hereinafter made, with power to them, the executors, to sell or foreclose mortgages, to collect debts, and to sell or lease the real estate at public or private sale, for cash or on credit, to be guided solely by their own judgment as to prices and the time when it may be advisable to sell for the interest of the estate; to deposit at interest, lend on security of mortgages, or invest in the Dominion funds, any balance that may be on hand at any time, to form a fund to keep up the yearly payments to my sisters as is hereinafter provided, namely: to pay to each one of my sisters Janet, Margaret, Isabella, and Catharine $250 a year, or, if there be not so much available in any year, then to divide equally between them what may be available and make up the deficiency to them when there are funds to do it with, and to pay to any of them who may have greater need on account of ill health or misfortune a greater sum than to the others and a greater sum than $250 as, in the opinion of the executors, may be fit.

"After sufficient funds have been invested to keep up the payments to my sisters as aforesaid, then the executors to pay, as soon as, in their opinion, it may be convenient, $400 to Jehiel Derosier, who lost a hand in my service, and $200 to each of the children of Samuel Rossiter, deceased, namely, Adelaide Wolff, Ellen Hartwell, and Reuben W. Rossiter, or in like proportion to each of the four persons just named, if there be not enough to pay them in full.

"And to pay to the children of my brother James McKenzie whatever may remain of the estate, share and share alike, and so that the child or children of such as may be dead will take his, her, or their parent's share.

"Lastly, I nominate, constitute, and appoint James Pliny Whitney, barrister, my sister Janet McKenzie, and my nephew

James McKenzie, executors of this my last will and testament, hereby revoking all former wills made by me."

Janet died on the 30th May, 1897, and Margaret on the 16th June, 1901.

James McKenzie, the brother of the testator, died on the 15th March, 1902, leaving him surviving six children, who were all of age and were the only residuary legatees under the will.

The affidavit of Catharine McKenzie, filed on the motion, stated that she was now 77 years old, and that her sister Isabella Hamilton was 79 years old; and proceeded:

"11. I am informed by the said executors that the inventoried value of the estate of the said late William McKenzie as sworn to on the application for probate was $81,127.43, and the balance after payment of debts $76,174.11, of which $45,450 was estimated as the value of the real estate, and that the residue, after payment of succession duties and specific devises, bequests, and legacies having priority to the bequests in the above recited clauses to my sisters and myself, is estimated at $33,000, of which $18,750 is the estimated value of real estate and $14,250 is on hand in mortgages, cash in savings bank, etc. Much of the real estate has, I believe, been unproductive, and I believe, as stated by the said executors, that the yearly interest, rents, and profits of the estate have not been sufficient to meet the payments to my sisters and myself in full, but I am informed by the said executors that there has always been on hand cash enough for the purpose if they had felt free to apply it in that way. I am also informed that, owing to a sale of some lands in Manitoba and of a sale of some property in Morrisburg, which is about completed, there is no doubt the income in the future will be sufficient to meet the payments to my sister Isabella Henderson and myself, who as above stated are the only ones surviving.

"12. The amount received by me on account of the said payments to this date is the sum of $930, by my sister Mrs. Henderson the sum of $710, and the amount paid to my sister Margaret, who resided in Edinburgh, Scotland, the sum of $515.

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"13. My said sister Isabella Henderson and myself had been for many years supported by our said brother, and at the time of his death were entirely dependent on him for support."

The motion was heard by MACMAHON, J., in Chambers, on the 7th November, 1902.

A. H. Marsh, K.C., for the applicants, Catharine McKenzie and Isabella Henderson.

E. D. Armour, K.C., for a number of the children of James McKenzie, who were the residuary legatees, and for Jehiel Derosier and the children of Samuel Rossiter.

J. R. Meredith, for the executors.

November 18. MACMAHON, J. [after setting out the facts as above]:—The yearly income derived from all the investments and from all other sources has been insufficient to pay the $250 annuities to the sisters of the testator, and the applicants, Catharine McKenzie and Isabella Henderson, contend that the sums payable to them under the will should have been paid out of capital, if the yearly income was insufficient to meet such payments. The executors doubt whether they have the right to make such payments out of principal, and submit that they can only apply the yearly income towards the payments.

The language of that part of the will providing for the creation of a fund to meet the annuities, indicates that the testator intended that the whole fund so created should be available to pay the annuities. For the executors are directed to realize the real and personal estate, and, after paying the expenses of administration, the debts, and certain bequests, "to invest any balance that may be on hand at any time to form a fund to keep up the yearly payments to my sisters as is hereinafter provided." Now the "fund" out of which the yearly payments are to be made is a fund directed to be formed from the various sources specified in the will. There is no direction that the annuities are to be paid out of the income derived from the fund. But, even had such a direction been contained in the will, it would not, according to the authorities, have deprived the annuitants of the right to resort to the

corpus to meet any deficiency in the annuities; for until the annuities are paid, and the bequests to Derosier and the children of Reuben W. Rossiter are satisfied, there is nothing for the residuary legatees.

In *Re Mason, Mason* v. *Robinson* (1878), 8 Ch. D. 411, the testator bequeathed life annuities to various persons, and then bequeathed his general personal estate to trustees "upon trust out of the income thereof to pay and keep down" the annuities, and, "subject thereto," upon trusts for his son and daughters. It was held there that the annuities were chargeable on the corpus. Sir George Jessel, M.R., said in giving judgment: "Now here is a gift of certain annuities, and a trust or direction to set apart a fund to answer them is created in this way: the testator bequeaths his residuary personal estate to trustees upon trust for sale, and to invest the proceeds in some or one of the investments thereinafter authorized, 'and to stand possessed thereof upon trust out of the income thereof to pay and keep down such of the annnities hereinbefore bequeathed as for the time being shall be payable; and subject thereto' upon trusts for his son and daughters. The question is, what is the meaning of the trust in this will? It is a trust to keep down the annuities, in the first place, no doubt, out of income, but it is not the less a trust to keep down: it does not do more than indicate a mode of providing for the annuities previously given. Why, then, should it prevent payment of the annuities being made out of the capital if the income proves insufficient? I am of opinion it ought not to do so, and that the arrears of the annuities may be paid out of the capital if the specific means provided for payment shall not be found sufficient for the purpose."

In *Re Taylor, Illsley* v. *Randall* (1884), 50 L.T.N.S. 717, a testator, after giving various pecuniary legacies, bequeathed to various persons annuities of £1 a week, and he directed sufficient funds to be appropriated in the name of his trustee out of his personal estate to answer by means of the income the payment of the annuities, and he directed that on the dropping of the annuities the appropriated funds should follow the distribution of his residuary personal estate. The income of the personal estate, after payment of the pecuniary legacies,

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was insufficient to pay the annuities. It was held that the annuities were payable, so far as necessary, out of the capital of the estate. In delivering judgment, Pearson, J., said: "In the present case the testator, by his will, made a separate and distinct gift of the annuities, the meaning of which was that they were to be paid absolutely. He then directed that sufficient funds should be appropriated in the name of his trustee out of his personal estate to answer by means of the income thereof the payment of the annuities, and he further directed that on the dropping of the annuities the appropriated fund should fall into and follow the distribution of his residuary personal estate. Therefore, there could be no ultimate residue until the payments of the annuities had all been made. The question, therefore, is whether this is a matter to be adjusted between an annuitant and a residuary legatee, or between a tenant for life and a remainderman. That was the question in *Baker* v. *Baker* (1858), 6 H.L.C. 616, and the conclusion there arrived at is that at which I also arrive, namely, that the intention of the testator must be ascertained with reference to the circumstance that has arisen; and I arrive at this, in the present instance, that, inasmuch as a residuary legatee can take nothing until the testator's debts and bounties are provided for, so here there is nothing for the residuary legatees until the annuities are paid in full. That which distinguishes this case from *Baker* v. *Baker*, where it was decided that the widow was not entitled to have the annuity made good out of the corpus, is the circumstance that in that case there was no absolute gift of the annuity in the first instance. Here there is such a gift which brings the case therefore within the decision in *Re Mason*, *Mason* v. *Robinson*, 8 Ch. D. 411, and I adopt as a part of my judgment the words of Jessel, M.R., 'I have not received from the learned counsel on either side a suggestion that there is any authority that where there is a simple gift of an annuity, followed by a discretion to set apart a fund to secure it, that will cut down the right of the annuitant to receive only the income of the fund; I must assume that no such authority exists.' So here there was a direction to set apart a fund, but there is nothing to take away the right of the annuitants to be paid out of the general estate. I have the more confidence in

arriving at the conclusion to which I have come, seeing that the testator very clearly intended that these annuities of £1 a week should be for the maintenance of the legatees to whom they were given."

The case in hand cannot be distinguished from *Re Mason, Mason* v. *Robinson* and *Re Taylor, Illsley* v. *Randall.* I refer also to the judgment of Sir John Rolt, L.J., in *Birch* v. *Sherratt* (1867), L.R. 2 Ch. 644, at p. 649; to *Carmichael* v. *Gee* (1880), 5 App. Cas. 588: and to *Jones* v. *Jones* (1879), 27 Gr. 317.

The annuitants, Isabella Henderson and Catharine McKenzie, are entitled to be paid the annuities of $250 each and arrears, out of the corpus of the testator's estate. Any balance of the annuity remaining unpaid at the deaths of Janet and Margaret to be paid to their personal representative.

The costs of all parties will be payable out of the estate, the executors' as between solicitor and client.

E. B. B.

[DIVISIONAL COURT.]

D. C.
1902
Nov. 27.

FLETT v. COULTER.

Infant—Evidence—Examination for Discovery.

An infant suing by a next friend may, in the absence of special incapacity, be examined for discovery.

Arnold v. *Playter* (1892), 14 P.R. 399, approved.

Judgment of Meredith, C.J., C.P., affirmed.

An order for the examination of an infant for discovery should not give to the examiner a discretion to determine the capacity of the infant; the proper manner of raising any question as to the capacity of the infant is by motion to set aside the appointment, or, if there is no time for that, then upon the motion to commit for non-attendance, so that the question of capacity may be considered by the Court itself.

APPEAL by the plaintiff from an order of Meredith, C.J., C.P., affirming that of the Master in Chambers.

The plaintiff was an infant of the age of twelve years, and brought this action by his next friend to recover damages for injuries sustained by him by being kicked by a horse belonging to the defendant. The plaintiff's contention was that the accident took place without his fault while he was playing in a street; while the defendant's contention was that the plaintiff had been teasing the horse. Upon the application of the defendant, the Master in Chambers made the order in question, which directed the plaintiff to attend at his own expense before a special examiner to be examined as to his competency to give evidence, and to submit to be examined *vivâ voce* for discovery unless the special examiner should deem him of too tender an age to be examined. There was no evidence on the motion as to the mental capacity of the plaintiff.

The appeal was argued before a Divisional Court [FALCONBRIDGE, C.J., K.B., and STREET, J.] on the 3rd of November, 1902.

J. G. O'Donoghue, for the plaintiff. There is no right to examine an infant for discovery. The order appealed from has been made upon the authority of *Arnold* v. *Playter* (1892), 14 P.R. 399, but that case was wrongly decided and should be overruled. It is clear that before the Judicature Act there was, under the Chancery practice, no right to administer

interrogatories to an infant for discovery, and it has been held in England that under the Judicature Act and rules as originally passed, there was therefore no right to examine an infant for discovery: *Mayor* v. *Collins* (1890), 24 Q.B.D. 361; *Curtis* v. *Mundy*, [1892] 2 Q.B. 178. The right was subsequently given by a new rule, Order 31, Rule 29. There is in Ontario no rule corresponding to this. The decision in *Arnold* v. *Playter* was based mainly on the omission from Con. Rule 313, then in force, of the reference to the Chancery practice formerly contained in Rule 96 of 1881, but sections 48 and 128 of the Judicature Act cover the point, and the English decisions should be held to govern. Even if there is the general right, under the particular circumstances of this case the order should not have been made. The infant here is only twelve years of age, while in *Arnold* v. *Playter* the infant was in his twenty-first year: see *Regina* v. *Clarke* (1857), 7 E. & B. 186, at p. 197.

W. R. P. Parker, for the defendant. *Arnold* v. *Playter* has been treated for over ten years as settling the practice, and it is too late now to overrule that decision, especially as after that decision the rules were revised and re-enacted without change, the effect of that clearly being that the interpretation of the rules then judicially given was adopted. The decision is in itself sound. *Mayor* v. *Collins*, 24 Q.B.D. 361, relied on, has been questioned in *Redfern* v. *Redfern*, [1891] P. 139. There is no doubt that an infant is a compellable, and, in the absence of mental or moral incapacity, a competent witness. The question of age is immaterial, and no absolute rule can be laid down. Upon an examination for discovery, just as upon an examination at a trial, the judge or examining officer must decide whether the infant whose examination is desired is of sufficient intelligence to make it permissible to examine him. This right is specifically reserved to the plaintiff in this case, and there is nothing of which complaint can reasonably be made.

O'Donoghue, in reply.

November 27. The judgment of the Court was delivered by STREET, J.:—The precise question raised upon the present

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appeal was determined in Chambers upon an appeal from Mr. Winchester, the Master in Chambers, in the case of *Arnold* v. *Playter*, 14 P.R. 399, nearly eleven years ago, adversely to the contention now raised by the plaintiff, in the year 1892; and, so far as I can ascertain, no question as to the correctness of that decision has been raised down to the present time, nor have the rules under which it was decided been altered in the revision of 1895. At the time *Arnold* v. *Playter* was decided, the English practice upon the point, owing to the difference in the form of their orders, referred to in *Arnold* v. *Playter*, was otherwise, but in November, 1893, a change was made by which infants were declared to be subject to the orders relating to discovery (O. 31, Rule 29 of Supreme Court).

We are now asked to reverse the practice of eleven years, and to go back to the practice which formerly prevailed in England, which it is contended was introduced here from England, but which our Courts have refused to follow, and which the English Courts have abandoned.

In my opinion, we should adhere to the practice settled in *Arnold* v. *Playter*, and dismiss this appeal with costs.

The portion of the order which gives to the examiner a discretion to determine the competency of the infant and to act accordingly has not been appealed against by either party, and I do not therefore feel called upon to interfere with it: but it does not strike me as being a proper or convenient practice. It appears to me that the proper manner of raising any question as to the competency or capacity of the party to be examined is by a motion to set aside the appointment, or, if there is no time for that, then upon the motion to commit for non-attendance, so that the question of capacity might be raised and considered by the Court itself. If it be left to the examiner, the Court is not always in a position to review his discretion upon the same evidence as that upon which he exercised it.

In my opinion, the appeal should be dismissed with costs.

R. S. C.

[FALCONBRIDGE, C.J., K.B.]

IN RE BERGMAN V. ARMSTRONG.

1902
Dec. 6.

Bankruptcy and Insolvency — Assignments and Preferences — Declaration of Right to Rank—Division Court.

An action for a declaration of the right to rank against an insolvent estate, vested in an assignee under the Assignments Act, R.S.O. 1897, ch. 147, is not within the jurisdiction of the Division Court.

MOTION for prohibition.

The action was brought in the 1st division court of Middlesex for a declaration that the plaintiff was entitled to rank as a creditor for $56.55 against the estate of one George Bergman, vested in the defendant under an assignment for the benefit of creditors, made under the Assignments and Preferences Act, R.S.O. 1897, ch. 147.

Prohibition was moved for on the ground that a division court has no jurisdiction to entertain such an action, and the motion was argued on the 5th of December, 1902.

W. H. Blake, K.C., for the defendant.

William Davidson, for the plaintiff.

December 6. FALCONBRIDGE, C.J.:—*Perry* v. *Laughlin*, decided by my brother Ferguson in July, 1901, seems to cover the very point in question.

As that judgment was not reported, and as colour seems to be lent to the plaintiff's contention by the appearance for the first time in the revision of 1897 of the words (in ch. 147, sec. 22), "or summons in case the action is brought in a Division Court," the prohibition will go without costs.

It is plain that the above words were deliberately inserted by the commissioners in pursuance of their quasi-legislative powers. I have looked up the draft with the kind assistance of Mr. J. G. Scott, K.C.

But the binding force of the judgment in *Perry* v. *Laughlin* relieves me from the necessity of considering their effect.

R. S. C.

[IN CHAMBERS.]

1902

Nov. 26.

RE PINK.

Will—Construction of—Inconsistent Bequests—Reconciling—Formal Bequest of Residue.

A testator bequeathed all his clothing, wearing apparel, and personal effects to his brother; all his household furniture and other personal property to his sister; he then devised to his sister for life all his real estate, with remainder in fee to his nephew, subject to certain legacies and annuities which he charged upon it; and wound up his will by devising and bequeathing the rest and residue of his real and personal property to his nephew.

At the time of his death the testator's personal property consisted of: household goods and furniture, $150; farming implements and live stock, about $500; book debts and promissory notes, $35; cash, $273; wearing apparel, watch, chain, etc., $25: total $983:—

Held, that all the brother took was the wearing apparel and the watch and chain; that the sister took all the remainder of the personalty; the nephew taking none of it.

The proper view of the residuary clause was that the testator, having disposed specifically of all his estate, both real and personal, added the residuary clause for the sake of greater caution or as a usual form.

MOTION upon an originating notice under Rule 938, on behalf of Henry Brown and Margaret Rosevear, executor and executrix of the will of Alexander Pink, deceased, for an order declaring the construction of certain clauses of his will.

The testator's will was dated the 28th November, 1899, and he died on the 9th April, 1902. By his will he appointed the applicants to be his executor and executrix and directed them to pay his debts. Then he made the following provisions:—

"I give and bequeath all my clothing, wearing apparel, and personal effects to my brother Robert Pink."

"I give and bequeath all my household furniture and other personal property to my sister Margaret Rosevear."'

He then devised to his sister Margaret Rosevear for her life all his real estate, with remainder in fee to his nephew Roy Pink, subject to certain legacies and annuities which he charged upon it. He then wound up his will with the following provision: "The rest and residue of my real and personal property I give, devise, and bequeath to my nephew Roy Pink."

At the time of his death the personal property of the testator was as follows:—

Household goods and furniture		$150
Farming implements, etc.	about	500
Horses		
Horned cattle		
Sheep and swine		
Book debts and promissory notes		35
Cash in hand and in bank		273
Wearing apparel, watch, chain, etc.		25
		$983

The questions to be determined were as to the effect of the three bequests of personalty set out above.

The motion was heard by STREET, J., in Chambers, on the 14th November, 1902.

W. F. Kerr, for the executor and executrix and for Margaret Rosevear personally.

B. Morton Jones, for Robert Pink.

F. W. Harcourt, for Roy Pink, an infant.

November 26. STREET, J.:—It is plain that the testator intended to give part of his personal estate to his brother Robert Pink, and part of it to his sister Margaret Rosevear. Whether he also intended to give any part of it to his nephew Roy Pink is the principal difficulty.

It being necessary to limit the gift to Robert in order to leave something for Margaret, a strict construction must be placed upon the gift to Robert, and this is readily done by applying the principle of *ejusdem generis* to it. I think I must hold that all that Robert took was the clothing and wearing apparel and watch and chain, because the testator has limited the bequest to his strictly personal effects, that is to say, to the effects connected with his person, such as his clothing and wearing apparel.

The next question is whether any similar limitation should be placed upon the words "all my household furniture and other personal property" in the gift to Margaret, in order to leave something for the residuary gift to Roy to act upon.

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In my opinion, it would not be proper to place any such limited construction upon the words of this bequest. In the first place, there is no necessity for holding that the testator intended Roy to take part of his personal estate under all circumstances; the gift, being of a residue only, would be satisfied by the possibility of his taking under the residuary clause any gift that should lapse. This view is confirmed by the fact that the testator, after using in the devise of the real estate the words "all my real estate," nevertheless afterwards devises and bequeaths "the rest and residue of my real and personal property" to his nephew Roy.

I think the proper view of the residuary clause is, that the testator, having disposed specifically of all his estate both real and personal, added the residuary clause for the sake of greater caution or as a usual form. The gift to Margaret Rosevear is expressed in language which it would be difficult to restrict unless the context was exceedingly cogent. "All my household furniture and other personal property" means "all my household furniture and *all my* other personal property," and is most comprehensive language. Looking at the nature of the testator's personalty, it would be impossible to place limits upon the expression used.

I have pointed out what passed in my view to Robert; all the rest of the personal estate must be declared to have passed to Margaret, and none to Roy the infant.

The costs of all parties of the application should be paid out of the personal estate going to Margaret.

T. T. R.

[IN THE COURT OF APPEAL.]

UNION BANK OF CANADA v. RIDEAU LUMBER CO.

C. A.
1902
Nov. 24.

Trespass—Cutting and Removing Timber—Measure of Damages—Wrongful and Wilful Acts.

In trespass, the inquiry is, what damages will compensate or restore the plaintiff financially to his original position as nearly as possible at the time when the trespass was committed.

Where the defendants had wrongfully and wilfully entered upon and cut and carried away timber from the plaintiffs' limits, and the plaintiffs sued for trespass only :—

Held, that the damages should be measured by : (1) the value of the timber after it was severed and manufactured, so far as it was manufactured, while on the timber limits of the plaintiffs, immediately before the defendants removed it ; (2) such sum as represented the extent to which the limits were injured, if at all, by reason of their having been partly denuded by the acts of the defendants ; (3) such further and other damage as resulted to the limits by the acts of the defendants, such, for instance, as wasteful methods in cutting, using the surface to pass and repass, etc.

Martin v. *Porter* (1839), 5 M. & W. 351, and *Bulli Coal Co.* v. *Osborne*, [1899] A.C. 351, applied and followed.

Judgment of Lount, J., 3 O.L.R. 269, affirmed.

AN appeal by the defendants from the decision of Lount, J., 3 O.L.R. 269.

The action was for an injunction and damages in respect of trespasses alleged to have been committed by the defendants upon timber limits under license to the plaintiffs.

The statement of claim alleged that the defendants wrongfully and wilfully entered and trespassed upon the lands and premises covered by and included in the plaintiffs' timber licenses from the Crown and cut trees, etc., standing thereon, and carried away and converted the same to their own use, whereby also the plaintiffs' timber limits became depreciated in value.

The action was tried before Street, J., who gave judgment (11th October, 1899), in favour of the plaintiffs, declaring that they had the right to recover damages from the defendants in respect of the matters complained of in the statement of claim; directing a reference to the local Master at Ottawa to ascertain the value of the timber cut and the damage to the plaintiffs from and incidental to the cutting down and carrying away thereof and other trespasses committed by the defendants upon and in respect of the plaintiffs' timber limits; adjudging that

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the defendants should pay to the plaintiffs the amount so to be ascertained; and enjoining the defendants from further trespasses.

The Master reported that the plaintiffs were entitled to recover $3,567.22.

Both the plaintiffs and defendants appealed from the report, and Lount, J., allowed the plaintiffs' appeal with costs, and dismissed the defendants' cross-appeal with costs; and directed a reference back to the Master to ascertain the damages to be recovered from the defendants in respect of the matters complained of in the statement of claim during the seasons of 1897-98 and 1898-99, on the footing of wrongful and wilful trespasses.

The defendants appealed from the order of Lount, J., to the Court of Appeal, and the plaintiffs with their reasons against the appeal gave notice of their intention to contend that the decision should be varied, upon grounds which they stated.

The appeal was heard on the 1st and 2nd May, 1902, by OSLER, MACLENNAN, MOSS, and GARROW, JJ.A.

G. F. Henderson, for the defendants. The judgment of the trial Judge is not conclusive as to the measure of damages. He decided that there had been a trespass, but not whether it was a wanton or an innocent one. The plaintiffs suffered no damage beyond the loss of the timber taken. The word "wilful" used in the pleading is not alone sufficient to charge the defendants with damages to be assessed upon the severe rule, the application of which is not dependent upon mere wilfulness. "Wilful" means no more than "intentional:" *In re Young and Harston's Contract* (1885), 31 Ch. D. 168, 174. An act may be wilful and yet innocent: *Regina* v. *Price* (1840), 11 A. & E. 727, 738; *Gordon* v. *Great Western R.W. Co.* (1881), 8 Q.B.D. 44; *Lewis* v. *Great Western R.W. Co* (1877), 3 Q.B.D. 195; *Foulger* v. *Steadman* (1872), L.R. 8 Q.B. 65, at p. 68; *White* v. *Feast* (1872), L.R. 7 Q.B. 353. The Master was right in applying the rule as to trespass committed under claim of right asserted in good faith. It is not a question of whether

the claim of right is well or ill founded, but a question of good or bad faith: *Livingstone* v. *Rawyards Coal Co.* (1880), 5 App. Cas. 25, at p. 34. Since *Wood* v. *Morewood* (1841), 3 Q.B. 440 *n.*, the intention of the defendant has been the determining element: *Hilton* v. *Woods* (1867), L.R. 4 Eq. 432; *Woodenware Co.* v. *United States* (1882), 106 U.S.R. 432; *Smith* v. *Baechler* (1889), 18 O.R. 293; *Railway Co.* v. *Hutchins* (1877), 32 Ohio St. 571; *Winchester* v. *Craig* (1876), 33 Mich. 205; *Tuttle* v. *White* (1881), 46 Mich. 485; *Cushing* v. *Longfellow* (1846), 26 Me. 306. With respect to the coal mining cases, it should be observed that greater care is necessary to protect against fraud in underground working than in other cases. But even in these cases there is no necessary presumption of fraud. Every case must depend upon its own circumstances: *Bulli Coal Co.* v. *Osborne*, [1899] A.C. 351, 364. In view of the fact that the trespass was not wanton, but was owing to the mistaken belief of the defendants that they had a right to do as they did, the measure of damages should be the value of the timber taken, such value to be ascertained as the price for which the stuff eventually sold, after deducting therefrom the expenses which the defendants were at in cutting and dressing it and bringing it to market; and this was the principle applied by the Master. He erred, however, in working out some of the details, and if the defendants' appeal is allowed, and the Master's measure of damages adopted, there should be a reduction of the damages in respect of prices at which ties sold, allowance for peeling, and cost of production or severance.

W. M. Douglas, K.C., and *J. F. Smellie*, for the plaintiffs. The judgment of the trial Judge concludes the defendants as to the measure of damages: *Carnegie* v. *Federal Bank* (1884), 8 O.R. 75, 77, 81. But, if it is open now for the defendants to contend that their trespasses were not wilful, the evidence at the trial and on the reference shews that they were. The conversion by the defendants took place after actual notice given on the ground to the defendants' manager and jobbers that they were trespassing; and this makes a trespass wilful: *Trotter* v. *Maclean* (1879), 13 Ch. D. 574, at pp. 586-88; Addison on Torts, 6th ed., pp. 39, 360. The measure of damages is the whole value of the timber, without deduction: Sedgwick on Damages,

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8th ed., vol. 2, sec. 504; *Woodenware Co.* v. *United States*, 106 U.S.R. 432; Bainbridge's Law of Mines, 5th ed., pp. 449, 450. But, if the Master was right in the principle upon which he assessed the damages, he erred in the allowances he made to the defendants by way of deduction from the price at which they sold the timber. [Counsel discussed the evidence as affecting this question and the questions raised by the defendants.]

November 24. The judgment of the Court was delivered by GARROW, J.A.:—This is an appeal from the judgment of Lount, J., allowing an appeal from the report of the Master at Ottawa, to whom the question of the amount of damages sustained by the plaintiffs by the trespasses of the defendants in entering upon and cutting and carrying away a large quantity of timber from certain timber limits standing in the name of the plaintiffs, and which they held as security for the indebtedness of a firm of McRae Bros. & Co., was referred by Street, J., at the trial, who held the trespasses as alleged by the plaintiffs to have been established.

The allegation in the statement of claim is that the trespasses were "wrongfully and wilfully" committed.

The formal judgment drawn up and settled states that "this Court doth declare and adjudge that the plaintiffs have the right to recover damages from the defendants in respect of the matters complained of in the plaintiffs' statement of claim . . . and this Court doth order and adjudge that it be referred to William L. Scott, Esquire, Master at Ottawa, to ascertain the value of the timber cut and the damage to the plaintiffs from and incidental to the cutting down and carrying away thereof, and other trespasses committed by the defendants upon and in respect of the plaintiffs' timber limits . . . and that the defendants do pay to the plaintiffs the amount thereof when so ascertained."

The learned Master, treating the matter as open, that is, the measure of damages, in a carefully considered judgment, reached the conclusion that the trespasses were not wilful but rather innocent or inadvertent, and he applied the milder rule of assessment.

The learned Judge before whom the appeal came reached a different conclusion, and directed that the matter should be referred back to the Master to ascertain and report the amount of the damages on the footing of "wrongful and wilful" trespasses.

In the reasons for his judgment the learned Judge apparently held that the nature and quality of the trespasses in question were *res judicata* by the judgment pronounced at the trial, a conclusion which, with deference, I am inclined to doubt, but as, after a careful perusal of the evidence, I am of the opinion that the formal judgment defining the trespasses as "wrongful and wilful" is correct and should be sustained, it would be a waste of time to attempt to solve this doubt, nor is it necessary in the view which I take to deal specifically with the several heads of appeal nor with the cross-appeal by the plaintiffs. The whole matter should, I think, be referred back to the Master for reconsideration upon the new footing of wrongful and wilful trespasses.

Perhaps in justice to the learned Master it is proper and advisable that I should indicate what I conceive to be the true meaning and extent of the so-called severe rule in estimating damages in trespass cases, especially as somewhat extravagant claims of the extent of the rule were urged upon us by the plaintiffs' counsel and also in the reasons against the appeal.

The action, it is to be observed, is purely one of trespass, and the formal judgment at the trial so treats it.

In the cases, referred to by the learned counsel, of *Smith* v. *Baechler*, 18 O.R. 293, *Woodenware Co.* v. *United States*, 106 U.S.R. 432, *Tuttle* v. *White*, 46 Mich. 485, the articles had reached the hands of purchasers from the original trespassers, who, of course, had no better title than their vendors had. Demands were made in each case upon the defendants for the return of the articles themselves, and not acceded to. Such demands and refusals in each case were held to constitute a wrongful conversion of the articles by the defendants.

Upon this state of facts the authorities are clear that *in trover* the value of the article at the time of conversion is the proper measure of damages: *Scott* v. *McAlpine* (1857), 6 C.P. 302; *Henderson* v. *Williams*, [1895] 1 Q.B. 521.

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Whether it is right that there should be one measure of damages against the original trespasser when sued in trespass, and another and apparently a more severe one against his vendee, from whom the article is claimed in an action of trover, is not the question. It is, I think, clearly the law, and has this not easily answered logical foundation, that the article after severance continues to be the property of the original owner. He can follow and reclaim it any where and in any hands. The original trespasser's labour in rendering more valuable the fruit of his wrong cannot be compensated for in his hands, nor the right to it as compensation transferred to his vendee, so that, whenever the article is caught up to by the true owner, he can successfully claim it in its then state, or its then value, if the defendant refuses to give it up.

But such a rule has not, I think, been applied in cases such as this, where the original trespasser is sued; not because he is entitled to any consideration, but because in trespass the value of the article taken is not the only or necessarily the chief element which enters into the question of the amount of damages recoverable. And yet, after all, the real inquiry is not seriously different. In trover it is, subject of course to allegation and proof of special damage, the value of the article converted, at the time of conversion (of which conversion the demand and refusal are merely evidence), whereas in trespass the inquiry is, what damages will compensate, or, in other words, restore the plaintiff financially to his original position as nearly as possible, at the time when the trespass was committed. Here the trespasses were committed, and as continuing acts completed, when the defendants had cut and removed the timber in question off the plaintiffs' lands or timber limits. The plaintiffs might have followed the articles and claimed them, as I have pointed out, and, had they done so, would, I think, have established, in case of a refusal to deliver, a different cause of action, in other words, such a cause of action as was involved in the cases to which I have referred. But, instead, they have sued in trespass, and the damages recoverable in actions of trespass must now, I think, be the measure of their recovery.

The point has not, so far as I can find, received much, if any, consideration in this Province, probably because such

questions as the amount of damages are usually determined as questions of fact by juries under judicial charges more or less general in their terms.

In *Flint* v. *Bird* (1854), 11 U.C.R. 444, which was an action of trespass for cutting down trees, making 3,000 saw logs worth 4s., or 80c., a log when drawn out, and converting them, the jury awarded £319 1s., the equivalent of $1,276.20 of our present currency. The evidence shewed that it would cost about 50c. each to get the logs out, leaving as the net value of the logs about $900, but the plaintiff had had additional expense in running the lines, counting the logs, etc., to establish the trespass. The defendant and his man had been violent and threatening, and the trespass was evidently, as the judgment designates it, "a high-handed depredation." A motion was made to reduce the verdict as excessive, but refused. The judgment was delivered by Sir John B. Robinson, who says: "We should not go into nice calculations of the value of timber thus plundered, in order to confine the jury to that simply as the measure of damages." No one apparently suggested that the plaintiff was entitled to the whole value of the logs after they were taken out by the labour and at the expense of the defendant.

The question, however, has been repeatedly discussed in England, especially in underground trespasses in the getting of coal, and as there is apparently no difference between a trespass underground and on the surface: *Hunter* v. *Gibbons* (1856), 1 H. & N. 459, at p. 465; *Bulli Coal Co.* v. *Osborne*, [1899] A.C. at p. 361: there is no reason, I think, why the principles of these coal cases should not apply. In one of the earlier cases, still constantly treated as a leading authority—*Martin* v. *Porter* (1839), 5 M. & W. 351—Parke, B., laid down the rule that in a case where coal had been taken out under title or colour of right, the measure of damages is that the plaintiff is entitled to the value of the coal as a chattel at the time when defendant began to take it away, that is, as soon as it existed as a chattel, which value would be the value at the pit's mouth, less the cost of raising it, but not of severance, and also to damages for what is called way-leave. He also pointed out that the plaintiff in trover would have been entitled in such a

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case to claim the coal either at the pit's mouth or on the canal bank, if plaintiff had demanded it at either place, without any allowance for having worked it, but that, not having so demanded it, the remedy was in trespass, and the damages the value of the coal at the pit's mouth, less the value of raising it, but not of severance. The rule so laid down at the trial was afterwards approved by the full Court, and has been repeatedly followed ever since, the most recent case that I have seen being *Bulli Coal Co.* v. *Osborne*, [1899] A.C. 351, before the Privy Council, our highest appellate Court. There the learned Judge in the Court below had held that the coal was taken wilfully and fraudulently, and had directed a reference to ascertain the value at the pit's mouth, after making just allowances, but not including the cost of severance, and his judgment was sustained first by the full Court and afterwards by the Privy Council. See also *Trotter* v. *Maclean*, 13 Ch. D. 574; *Jagon* v. *Vivian* (1871), L.R. 6 Ch. 742; *Taylor* v. *Mostyn* (1886), 33 Ch. D. 226; *Llynvi Co.* v. *Brogden* (1870), L.R. 11 Eq. 188; *Attorney-General* v. *Tomline* (1877), 5 Ch. D. 750, (1880), 15 Ch. D. 150; *Morgan* v. *Powell* (1842), 3 Q.B. 278.

Applying the rules laid down in these cases to the present case, it appears to me that the proper measure of damages is:

1st. The value of the timber after it was severed and manufactured, as far as it was manufactured, while on the timber limits of the plaintiffs, immediately before the defendants removed it. Such value may be conveniently ascertained by taking into account the amount for which defendants afterwards sold the articles, less the cost of carriage, and excluding the cost of severing and manufacturing.

2nd. Such sum (if any) as represents the extent to which the timber limits themselves may have been injured for the purpose of working or of selling them, by reason of their having been partially denuded by the acts of the defendants, because it may well be that, over and above the value of the timber taken, a serious injury may have been done to the value of the timber left, and, in order that the plaintiffs may be fully compensated, this should be taken into account.

3rd. Such further and other damages as the plaintiffs may shew, or have shewn in case no further evidence is offered,

resulted to the timber limits in question by the acts of the defendants, such, for instance and by way only of illustration, as wasteful methods in cutting, manufacturing, and otherwise using or destroying, not merely the trees taken, but those left, if those left were cut down or injured; also damages, if any, for using the surface to pass and repass, and for cutting and making roads, etc., all of which were of course wrongful and included in the trespasses complained of, and are not necessarily included in the value of the articles themselves, the chief element in determining the plaintiffs' compensation.

With these instructions, I think the matter should be remitted to the Master, the defendants' appeal dismissed with costs, and the cross-appeal of the plaintiffs also dismissed, but without costs.

E. B. B.

[IN CHAMBERS.]

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Nov. 17.

SHANTZ v. TOWN OF BERLIN.

Trial—Jury Notice—Striking Out—Judge in Chambers—Common Law Action—Action to Restrain Nuisance—O.J.A. sec. 103.

An action to restrain a nuisance and for damages not being one which prior to the Administration of Justice Act, 1873, was cognizable by the Court of Chancery, a jury notice therein is not irregular, under sec. 103 of the Ontario Judicature Act, R.S.O. 1897, ch. 51.

While no doubt a Judge sitting in Chambers has discretionary power to strike out a jury notice in such a case, the practice is to leave it to be dealt with by the trial Judge.

THIS was a motion by the plaintiff to strike out a jury notice in this, and certain other actions, all of which had been brought against the town of Berlin for injunctions restraining the defendants from continuing a nuisance in the shape of a sewage farm in the neighbourhood of the lands of the plaintiff, and for damages.

The motion was argued on November 17th, 1902, before MEREDITH, C.J.C.P., in Chambers.

C. P. Smith, for the plaintiff, referred to *Farran* v. *Hunter* (1887), 12 P.R. 324; *Lauder* v. *Didmon* (1894), 16 P.R. 74.

E. E. A. Du Vernet, for the defendants, contended that this was an action which could be tried by a jury at common law and referred to Roscoe's Nisi Prius, 15th ed., p. 659, and to an unreported decision of the Master in Chambers, of February 18th, 1892, in a case of *Andrews* v. *Burns*, holding that a jury notice should not be struck out in an action in which the plaintiff claimed an injunction against a nuisance.

MEREDITH, C.J. :—I do not think I can make an order to strike out the jury notice. While no doubt a Judge sitting in Chambers has power in the exercise of his discretion to strike out a jury notice in an action such as this, although the party requiring a jury may *primâ facie* be entitled to it, the practice is not to exercise that power, but to leave it to be dealt with by the trial Judge. It would be useless to enlarge the motion

till the trial unless the case goes down to a sittings at which there will be a jury, so that I cannot adopt the course I would take, if the next sittings were a jury sittings, of enlarging the motion to be disposed of by the trial Judge.

I do not think the plaintiff is entitled to have the notice set aside as irregular. The defendants had the right to file a jury notice if this action was not one which before the Administration of Justice Act of 1873, was cognizable exclusively by the Court of Chancery, and I think it was not.

An action for a nuisance was a common law action. An action to restrain by injunction the continuance of a nuisance was an equitable one, but by the Common Law Procedure Acts —at all events long prior to the Administration of Justice Act of 1873—the common law Courts had power to grant an injunction in a case such as this; that being so it does not come within section 103 of the Judicature Act, R.S.O. 1897, ch. 51, so as to make it triable without a jury, and a jury notice improper.

I think, too, that in this case no great harm can be done, as the defendants seem to be endeavouring to arrive at some solution of the troublesome problem of the disposal of their sewage.

This is not, I think, the first litigation which this town has had in regard to the pollution of or the emptying of its sewage into the stream; the effect of that litigation may have been the adoption of the sewage disposal farm, which is alleged to be the cause of the evils of which the plaintiff complains. No great harm will be done by giving the defendants some further time, if that be the effect of my decision.

I can make no order upon this application, but under all the circumstances the costs will be costs in the cause.

A. H. F. .L

END OF VOLUME IV.

APPENDIX.

Reported cases from Ontario disposed of by the Judicial Committee of the Privy Council and by the Supreme Court of Canada up to the 1st of March, 1903.

Judicial Committee.

Bank of Hamilton v. Imperial Bank, 27 A. R. 590, 31 S. C. R. 344. Appeal dismissed, 13th November, 1902: [1903] A.C. 49.

Ontario Mining Company v. Seybold, 31 O. R. 386, 32 O.R. 301, 32 S.C.R. 1. Appeal dismissed, 12th November, 1902: [1903] A.C. 73.

Supreme Court of Canada.

Agricultural Savings and Loan Co. v. Liverpool and London and Globe Ins. Co., 3 O.L.R. 127. Appeal allowed, 17th February, 1903.

Attorney-General v. Scully, 4 O. L. R. 394. Leave to appeal refused, 9th December, 1902.

Challoner v. Township of Lobo, 1 O.L.R. 156. Appeal dismissed, 12th March, 1902: 32 S.C.R. 505.

Fowlie v. Ocean Accident and Guarantee Corporation, 4 O.L.R. 146. Appeal dismissed, 12th December, 1902.

Gibson v. Nelson, 2 O.L.R. 500. Appeal dismissed, 9th December, 1902.

Mowat v. Provident Savings Life Assurance Society, 27 A.R. 675. Appeal allowed, 6th May, 1902: 32 S.C.R. 147.

Myers v. Sault Ste. Marie Pulp and Paper Co., 3 O.L.R. 600. Appeal dismissed, 12th December, 1902.

Rennie v. Quebec Bank, 3 O.L.R. 541. Appeal dismissed, 17th February, 1903.

Rex v. Rice, 4 O.L.R. 223. Leave to appeal refused, 11th June, 1902.

Trusts and Guarantee Company v. Hart, 2 O.L.R. 251. Appeal dismissed, 8th November, 1902: 32 S.C.R. 553.

Re Village of Markham and Town of Aurora, 3 O.L.R. 609. Leave to appeal refused, 9th June, 1902.

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Held, that the application should not be treated as an appeal upon new material from the discretion of the Judge who made the order, as such an application having for its object the setting aside of the order and writ, must upon the authorities have failed: *Damer* v. *Busby* (1871), 5 P.R. 356, at p. 389. But was really one to the undoubted jurisdiction of the Court to set aside in its discretion orders which had been made by the wilful concealment or perversion of material facts, and that a clear case had been made out, and the order and writ should be set aside and prisoner discharged from custody.

Judgment of Falconbridge, C.J.K.B., reversed. *Merchants Bank of Canada* v. *Sussex*, 524.

ASSESSMENT AND TAXES.

1. *Equalization of Assessment—Appeal to County Court Judge — Time for Delivering Judgment — R.S.O. 1897, ch. 224, sec. 88, sub-sec. 7—Imperative Enactment.*]–The provision in sub-sec. 7 of sec. 88 of the Assessment Act, R.S.O. 1897, ch. 224, that the judgment of the county court Judge on appeal from the equalization by the county council of the assessment of the county shall not be deferred beyond the 1st day of August next after such appeal, is imperative.

Proceedings for equalization of the assessment, and the rolls of what financial year are to be equalized, considered.

Judgment of a Divisional Court, 3 O.L.R. 169, reversed. *In re Township of Nottawasaga and County of Simcoe*, 1.

2. *Distress — "Owner" — Agent for Mortgagees in Possession—Conditional Purchase—R.S.O. 1897, ch. 224, sec. 135, sub-sec. 3.*]—The plaintiff agreed with mortgagees of land in possession to purchase the property at a sum equal to principal, interest and costs, such purchase to be carried out so soon as the mortgagees should obtain a final order of foreclosure, and in the meantime that he should, as their agent, manage the property:—

Held, that the plaintiff, who had not been assessed for the property in question, and against whose name the taxes in question had not been charged on the collector's roll, was not an "owner" of the premises within sec. 35, sub-sec. 3 of the Assessment Act, R.S.O. 1897, ch. 224, whereby the collector is authorized to levy unpaid taxes "upon the goods and chattels of the owner of the premises found thereon," and such taxes could not be levied upon his goods. *Lloyd* v. *Walker*, 112.

3. *Local Improvements — Petition for — Municipal Act, R.S.O. 1897, ch. 223—Exempt Property — Municipality as Owner — Valuation of Land and Buildings.*]—In ascertaining whether a petition for a

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Held, that the second preference shareholders were not entitled to share in the surplus assets.

Held, also, that the surplus was divisible among the ordinary shareholders in proportion to the amount of their shares, not to the amounts paid on their shares.

Birch v. *Cropper*, *In re Bridgewater Navigation Co.* (1889), 14 App. Cas. 525, followed. *Morrow* v. *Peterborough Water Co.*, 324.

3. *Ontario Winding-up Act —Practice on Appeal—Settling Appeal Case—Final Order—R.S.O. 1897, ch. 222.*]—Section 27 of the Ontario Joint Stock Companies Winding-Up Act, R.S.O. 1897, ch. 222, contains the whole code of proceedings on an appeal under that Act. There is no provision requiring reasons for or against the appeal, or any delivery or settlement of the case in appeal.

Semble, an order of a county Judge rescinding an order previously made by him under sec. 41 of the above Act for the dissolution of the company is a final order, and therefore appealable. *In re Equitable Savings, Loan and Building Association*, 479.

4. *Winding-up Act—R.S.C. 1886, ch. 129—Claims Provable Thereunder — Fully Secured Creditors — Jurisdiction of Master.*] — Creditors holding fully secured claims, and content to rely on their security, without seeking to share in the distribution of the other assets, cannot be compelled to file their claims in winding-up proceedings under the Dominion Winding-up Act, R.S.C. 1886, ch. 129, and have them adjudicated upon therein; and where such creditors without any intention to submit to such adjudication had filed with the liquidator affidavits stating their claims as fully secured, leave was given them to withdraw the same. *Re Brampton Gas Co.*, 509.

5. *Mining Company—Purchase and Sale of Land — Irregularities in Proceedings — Directors — Qualification — Shares Held in Trust—Improper Proceedings to Bring Mining Lands to Sale.*] — A mining company subject to the provisions of the Ontario Companies Act, R.S.O. 1897, ch. 191, and the Ontario Mining Companies Incorporation Act, R.S.O. 1897, ch. 197, has power to buy and sell land, and a sale in good faith of all the land owned at the time by the company is not necessarily invalid, there being nothing to prevent the business of the company being continued by the purchase of other land.

Nor can such a sale made in good faith be restrained at the instance of a dissentient minority of shareholders on the ground that irregularities have occurred in the conduct of the proceedings of the company leading up to the sale, or on the ground that the approving majority are also shareholders in a rival company and are, in

a lot of growing this year, and will be pleased to take all you grow at same price as last year. We will see you later on and make final arrangements." Nothing further occurred until the following August, when the plaintiff sent several loads of cucumbers to the defendants, who accepted them and paid for them, nothing being said at the time of any contract between the parties:—

Held, that the defendants' letter was not an offer open to acceptance by the plaintiff, or by the delivery of cucumbers to them by the plaintiff, but a statement of their readiness to enter into an agreement with the plaintiff upon terms to be arranged.

Carlill v. *Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256, distinguished.

Judgment of Falconbridge, C.J., K.B., affirmed. *Baston* v. *Toronto Fruit Vinegar Co.*, 20.

2. *Parol Contract to Drive Logs—Statute of Frauds, sec. 4.*]—M., who had agreed with the defendants, and a number of other lumber manufacturers, to drive down their logs for them, the defendants' contract being a parol one, arranged with the plaintiff to act for him, the obligation to drive the defendants' logs to continue to a named date for which the plaintiff was to be paid a specified sum, and if M. did not then arrive and take over the drive, the plaintiff was to continue it and to be paid a specified sum per day for himself and those employed by him. M. did not arrive and the drive was continued by the plaintiff. Subsequently, M. having some difficulty in paying his men, a parol agreement was entered into between him and the defendants, whereby, in consideration of his assigning over to them the amounts due him by the defendants and other manufacturers, the defendants undertook to continue the drive and to pay the existing as well as the indebtedness thereafter to be incurred, the plaintiff being instructed and agreeing to continue the drive on these terms:—

Held, by ROBERTSON, J., that there was a new contract founded on new and substantial consideration, so that the fourth section of the Statute of Frauds did not apply.

On appeal to the Divisional Court the judgment was affirmed, but on the grounds (1) of novation, or (2) that even if M.'s indebtedness still continued, the moneys coming to him having been assigned to the defendants upon their express promise to pay the indebtedness thereout, and the plaintiff having continued the drive on such terms, there was a binding obligation to pay him, and that, in either view, the Statute of Frauds did not apply. *Bailey* v. *Gillies*, 182.

3. *Privity — Husband as Agent for Wife—Guarantee—Breach—Evidence of Husband's*

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After retiring to consider their verdict, the jury returned into Court and stated that they wished to know definitely what the Judge had said on the subject of conspiracy or collusion, and he said: "I told you, gentlemen, there was no evidence upon which you could find that there was a conspiracy or collusion between the three men up to the time the parcel was thrown into the cab, . . yet if, at that moment, or at any time up to the time of the shooting of the constable, the three men resolved to escape from the lawful custody they were in, then each would be responsible for the acts of the other, and if you find that, between the throwing of the parcel and the shooting of the constable, there was such a resolution, even although one of the other men fired the shot, the prisoner can be convicted of murder."

The jury came into Court again and said that they had agreed on their verdict. The clerk asked them whether they found the prisoner guilty or not guilty. The foreman answered: "On the first *count* we disagree." The clerk: "How do you find on the second *count*?" The foreman: "On the second *count* we find the prisoner guilty." The verdict was recorded, with the consent of the jury given in the usual way, as follows: "The jury find the prisoner guilty. They are unable to agree as to whether the prisoner fired the shot which killed William Boyd:"—

Held, upon the evidence, that immediately upon the parcel being thrown into the cab, the prisoner and at least one of the other men armed themselves with the revolvers and formed the common intention of, by the use thereof, prosecuting the unlawful purpose of escaping from lawful custody and of assisting each other therein, and that the shooting by one of them of the constable was an offence committed by one of them in the prosecution of such common purpose, and that the commission thereof was or ought to have been known to be a possible consequence of the prosecution of such common purpose: Criminal Code, sec. 61 (2); each of them was, therefore, a party to such offence, and the offence, being murder in the actual perpetrator thereof, was murder in the prisoner, even if he were not the actual perpetrator thereof, and he was properly found guilty by the jury of that offence, the evidence fully warranting their verdict.

2. That there was nothing in the charge, nor in the subsequent instruction to the jury, both of which must be read together, of which the prisoner could properly complain.

3. That the finding of the jury was a proper one and there was no mistrial. The foreman of the jury in speaking of "counts" was referring to the

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without the direct intent of the person injured, or happening as the direct result of his intentional act, such act not amounting to voluntary or negligent exposure to unnecessary danger. The jury found that there was no evidence to satisfy them that the deceased came to his death by his own hand, but that he came to his death by external injury unknown to them :—

Held, that the finding was too vague to be construed as a finding of accidental death, and a new trial was directed. *Fowlie* v. *Ocean Accident and Guarantee Corporation, Limited*, 146.

2. *Fire Insurance—Cancellation—R.S.O. 1897, ch. 203—Statutory Condition 19 (a)—Notice of Cancellation Received After Loss.*]—The insured sent to the company his policy with an endorsed surrender clause executed, and a letter asking that the insurance be terminated and the unearned proportion of the premium repaid. Owing to its misdirection by the insured the letter was delayed in the post-office and did not reach the company till the morning after the insured goods had been destroyed by fire :—

Held, that the letter did not take effect from the time of its being posted, but only from the time of its receipt ; and that the relationship of the parties had been so changed by the occurrence of the fire before its receipt that the attempted surrender did not operate, and therefore that the company were liable for the loss. *Skillings* v. *Royal Insurance Company*, 123.

3. *Fire Insurance—Mutual Plan—Annual Renewal—Proposal for Increased Premium—Non-acceptance — Condition of Payment in Advance — Delivery of Receipt—Waiver.*] Two policies on the mutual plan, issued in 1898 and 1899, provided for insurances for the original period of one year and "during such further period or periods for which the assured shall from time to time have paid in advance the renewal premium or premiums required by the company, and for which the company shall have issued a renewal receipt or receipts." The policies were delivered to the plaintiffs, without prepayment of any cash premium, and without the previous delivery of the premium notes in consideration of which the policies purported to be issued; but the cash was paid and the notes delivered soon afterwards.

On the 27th October, 1900, the executive officer of the defendants wrote to the plaintiffs enclosing a receipt for $363.23, being the amount of the cash premium for the renewal of both policies. The letter was on a printed form, stating that a receipt "renewing" the policies was enclosed, and asking the plaintiffs to remit the amount of the cash premium. It also asked for new premium notes, and stated

that the old ones were enclosed, as they were. The plaintiffs retained the receipts, but did not send the money or the notes until about the 20th December, 1900.

On the 28th October, 1901, the same officer again enclosed renewal receipts in a letter on the same form as above, but the amount of the cash payment was higher, and on the 6th November, 1901, the plaintiffs wrote to the defendants calling attention to the increase; the officer answered the next day that the defendants had been obliged to increase the rate; and on the following day the plaintiffs wrote as follows: "If you cannot do better we will have to accept, but we are going to ask you to reconsider the matter and meet us in this if at all possible. . . . Kindly give this your consideration and let us hear from you." On the 11th November the officer wrote to the plaintiffs: "The consulting board carefully considered your risk before making the advance in rate they did, and had no alternative but to do so to procure the re-insurance we required. Trusting this explanation will prove satisfac- to you." No answer was made by the plaintiffs to this.

On the 16th November, 1901, a fire took place and damage was done to the property covered by the defendants' policies. Two days afterwards the plaintiffs sent the defendants a cheque for the amount of cash demanded and new premium notes, but the defendants returned them.

The defendants re-insured their risk as soon as the premiums became payable, and had not cancelled these re-insurances down to the time of the trial:—

Held, that no contract existed between the plaintiffs and defendants for an insurance for the year beginning on the 31st October, 1901.

Semble, that if the plaintiffs had unqualifiedly accepted the renewal terms, the condition providing for payment in advance of the cash premium would have been waived; for the intention of the defendants in delivering the receipt, where the money had not in fact been paid, was to keep the policy in force and to give the plaintiffs credit for the amount. *Doherty* v. *Millers and Manufacturers Ins. Co.*, 303.

4. *Fire Insurance — Conditions—Prior Insurance—Subsequent Insurance—Substitution of Policies — Implied Assent—Adjustment of Loss—Waiver.*]—In an application for insurance, particulars of prior insurance in two other companies of $4000 in each company were given, but in the policy in question prior insurance of only $4000 was assented to, neither company being named. The defendant pleaded as a breach of the statutory condition non-disclosure of prior insurance for $4000 in one of the two companies:—

Held, that the plea must be read strictly and without amendment and that so read the assent in the policy to insurance of $4000 might be treated as an assent to the prior insurance complained of in the plea; and *semble*, that had the defendants not intended to assent to the prior insurance of $8000 they would have been bound under the second statutory condition to point out in writing the particulars wherein the policy differed from the application.

Held, also, that to a subsequent insurance for $4000 in another company in substitution for a prior insurance to that amount in one of the two companies mentioned in the application, the assent of the defendants was not necessary.

Assent, express or implied, to subsequent insurance is sufficient even if given after the loss has occurred. In this case such assent was held to be sufficiently shewn by the defendants joining in the adjustment of the loss and allowing the insured to accept from the subsequent insurers their proportion of the loss as so adjusted.

Judgment of Ferguson, J., affirmed. *Mutchmor* v. *Waterloo Mutual Fire Insurance Company*, 606.

5. *Life Insurance — Beneficiary Certificate—Designation of Beneficiaries—Indorsement —Will—1 Edw. VII. ch. 21, sec. 2, sub-sec. (7) (O.)—Infant Children of Assured.*]—A benefit society issued a beneficiary certificate payable to the wife of the assured at his death; she died; and he then (in 1895) indorsed on the certificate a direction that payment was to be made "to my children as directed by my will." The day before his death (in 1902) the assured made a will by which he directed that the whole of his estate should be divided amongst his children — there being both adult and infant children—in equal shares, but made no reference whatever to the benefit certificate or to the moneys payable thereunder :—

Held, that the infant children of the assured were entitled to the whole of the moneys, by virtue of the amendment made to the Insurance Act, R.S.O. 1897, ch. 203, s. 151, sub-sec. (6), by 1 Edw. VII. ch. 21, sec. 2, sub-sec. (7). *Re Snyder*, 320.

6. *Benevolent Society— Beneficiary Certificate—Alteration of Constitution—Domestic Forum—Retroactivity —R.S.O. 1877, ch. 167, sec. 4—Ib., 1897, ch. 211, sec. 5—Ib., ch. 203, sec. 2, sub-secs. 41 (a) (g) and 42—Ib., sec. 80.*]—A beneficiary certificate, dated October 19th, 1896, issued by a friendly society incorporated under The Benevolent Societies Act, R.S.O. 1877, ch. 167, was conditioned, *inter alia*, that the beneficiary complied with the constitution, rules, or orders governing, "or that might thereafter be enacted by the defendants to govern the order and its benefit funds," and by it the defendants agreed that

on the plaintiff, the beneficiary, attaining the age of 70, which he had done, they would pay out of the total disability fund, "in accordance with the laws governing such fund," sums not exceeding a certain amount:—

Held, that the constitution of the defendants having been duly altered in 1900 in respect to a beneficiary claiming on the ground of having attained the age of 70 years, from what it was in 1896, when the plaintiff's certificate was issued, in such a way as to diminish the amount the plaintiff would be entitled to, he was nevertheless bound by the alteration, and could only recover in accordance with it.

Held, also, that the plaintiff was not bound to exhaust, before action, the appeals within the society provided for by the rules, for under R.S.O. 1897, ch. 203, sec. 80, every lawful claim against an insurance corporation under an insurance contract shall become legally payable 60 days after proper proof of loss, and any rules, conditions or stipulations to the contrary shall, as against the assured, be void.

A provision of the defendant's constitution provided that the plaintiff must sign an acceptance subscribed thereto, which he had not done until shortly before action brought:—

Held, that the defendants, having assessed the plaintiff and accepted payment of the assessments on the footing of an existing certificate, and having accepted proofs of claim and paid part on account thereof, had waived this requirement.

Held, also, that the optional or special benefit which the plaintiff was claiming being payable in full and not by instalments, he was not estopped from insisting that the whole of the benefit was due, merely by reason of having accepted a cheque expressed to be for the full amount of the first instalment thereof.

Judgment of MacMahon, J., varied. *Doidge* v. *Royal Templars of Temperance*, 423.

7. *Life Insurance—Benevolent Society—Benefit Certificate—"Dependent"—Supposititious Wife.*]—A supposititious wife of the holder of a life benefit certificate in a friendly society, who had married him in ignorance that he had a lawful wife living, and had cohabited with him some six years and up to his death, believing herself during the greater part of this time to be his wife, and to whom the certificate was made payable by name, with the appellation "my wife" added, was held, after his decease, entitled as against the lawful wife to the moneys payable thereunder as being a "dependent" within the meaning of the society's rules, notwithstanding the conjunction of that word with a number of others importing relationship by blood or affinity.

Held, also, that although the society had not stood upon their strict rights but had paid the money into court to be dealt

JURISDICTION.

See HIGH COURT OF JUSTICE.

JURY.

See APPEAL, 1—INSURANCE, 1 — MEDICINE AND SURGERY — PRACTICE.

LANDLORD AND TENANT.

1. *Overholding Tenants Act—Summary Order for Possession — Review by High Court — Evidence—Breach of Covenant in Lease—Notice Specifying—Necessity for.*] — Under the Overholding Tenants Act, R.S.O. 1897, ch. 171, two things must concur to justify the summary interference of the county court Judge: the tenant must *wrongfully* refuse to go out of possession, and it must appear to the Judge that the case is *clearly* one coming under the purview of the Act.

It is only the proceedings and evidence before the Judge, sent up pursuant to the *certiorari*, at which the High Court may look for the purpose of determining what is to be decided under sec. 6 of the Act.

Where there is nothing in the evidence to shew that the tenants had violated the provision of the lease for breach of which the landlord claimed the right to re-enter, the Court set aside the order of the county court Judge commanding the sheriff to place the landlord in possession.

Per BOYD, C.:—The whole proceeding was nugatory from the outset for the want of a proper notice specifying the breach complained of, as required by sec. 13 of the Landlord and Tenant's Act, R.S.O. 1897, ch. 170, which is applicable to summary proceedings under the Overholding Tenants Act. *Re Snure and Davis*, 82.

2. *Taxes—Lessee of City — Usual Covenants — Assessment Act, R.S.O. 1897, ch. 224, sec. 7, sub-sec. 7 — Ib., sec. 26 — Railway—Covenant to Repair — Railway Committee of Privy Council.*]—City property when occupied by a tenant other than a servant or officer of the corporation occupying the premises for the purposes thereof, is subject to taxation (R.S.O. 1897, ch. 224, sec. 7, sub-sec. 7); and such tax is a tenant's tax, payable by him and not in any event payable by the landlord as between him and the tenant unless by express agreement.

Section 26 of the Assessment Act (R.S.O. 1897, ch. 224) as to tenants deducting taxes from their rent has no application to such a case, as it applies only to taxes which can be legally recovered from the owner; nor does that section apply to the case of a term held in perpetuity, as here.

Semble, also, that where the tenant, as in this case, holds in perpetuity under a renewable lease, he may be regarded as the "owner" within the meaning of the Assessment Act, and as such

But the plaintiff having, shortly after his dismissal, obtained other employment, and having received in respect thereof remuneration to a larger amount than the damages calculated as aforesaid, it was held that his action failed, and it was dismissed with costs. *Laishley* v. *Goold Bicycle Company*, 350.

2. *Workmen's Compensation for Injuries Act — Injury to Servant—Negligence — Dangerous Machinery -- Want of Guard — Factories Act, R.S.O. 1897, ch. 206, sec. 20.*]—The plaintiff, a boy between fourteen and fifteen years of age, was employed by the defendants in cleaning up around a machine—called a dove-tailing machine consisting of rapidly revolving knives—carrying pieces of board therefor, and on one occasion he had cleaned it. He had carried some boards and laid them down by the machine, and was going for another load when he was directed by the operator to straighten them out. On his proceeding to do so, and, not observing that the machine was in motion, he put out his hand to remove some dust on it when his arm was caught in the machine and cut off. The machine was of a very dangerous character, and the knives, when revolving, had the appearance of a solid stationary cylinder. There was no guard or protection around it, and no one at the time was in actual charge of it, the operator having left it, being some four feet away looking out of a window.

The jury found that the cause of the accident was the negligence of the defendants in not having the machinery properly guarded, and the inattention of the operator, and they negatived contributory negligence on the part of the plaintiff:—

Held, that the defendants were liable.

Judgment of Street, J., at the trial reversed. *Moore* v. *J. D. Moore Co.*, 167.

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3. *Workmen's Compensation Act — Notice of Injury — Absence of—Reasonable Excuse—Meaning of—Railway—Cause of Injury — Matter of Conjecture.*] — While the notice of injury required by sec. 9 of the Workmen's Compensation for Injury Act, R.S.O. 1897, ch. 160, is for the employer's protection against stale or imaginary claims, and to entitle him, while the facts are recent, to make enquiry, the injured workman is the primary object of the legislative consideration; and under such section and secs. 13 and 14, notice may be dispensed with where there is reasonable excuse for the want of it, the employer not being prejudiced.

What constitutes reasonable excuse must depend upon the circumstances of each particular case, and such may be inferred where there is the notoriety of the accident, the knowledge of the employers of the injury which resulted in death, and its

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NOTICE.

NOTICE OF APPEAL.

NOTICE OF DISHONOUR.

NUISANCE.

OFFICIAL REFEREE.

OPTION TO PURCHASE.

OUSTER.

OVERHOLDING TENANTS.

See LANDLORD AND TENANT, 1.

PARLIAMENTARY ELECTIONS.

1. *Recount of Votes—Marking Ballots.*]—Ballots marked with a straight line only are improperly marked and cannot be counted, while ballots marked with a cross upon or above the upper division line, or marked with a cross made by three or four pencil strokes, or marked with a cross and also with what might be taken for a "c," are properly marked and should be counted.

In initialling the ballots a deputy returning officer at one sub-division put as his initials H. G. instead of his full initials H. C. G., and a deputy returning officer at another polling sub-division put McN. instead of his full initials W. D. McN.:—

Held, that such ballots were sufficiently initialed within the meaning of the Act, the object of such initialling being merely the identification of the ballot, which was effected here, there being no suggestion that the number of ballots cast at the polling sub-division was not correct; and, *semble*, that under these circumstances the ballots should not be rejected, even if not initialed at all. *Muskoka Provincial Election*, 253.

2. *Recount of Votes—Marking Ballots.*]—Upon the recount of ballots cast at the election of a member for the Ontario Legislature, there being two candidates, ballots were allowed which were marked (1) with a cross below and to the right of the lower compartment; (2) with a cross in one compartment and a line in the other; (3) with a cross in one compartment and a faint and probably unintentional mark in the other; (4) with a mark in the form somewhat of an inverted Λ, as being probably intended for a cross; (5) with three crosses in one compartment; and (6) with a mark which might fairly be taken to be a clumsy and ill-made cross; and ballots were disallowed which were marked (1) with a single stroke—the error in the headnote in *West Huron* (1898), 2 E.C. 58, in which it is stated that ballots so marked were in that case allowed, being pointed out; (2) with a plain cross in one compartment, and a fainter, partly smudged or rubbed out cross in the other; (3) with the name of the candidate written in the compartment; and (4) with a circle in both compartments.

Ballots marked in due form, but with a coloured pencil, were objected to on the ground that there was possibly a design to identify the voters, but these were allowed, there being no evidence, and evidence not being admissible, to shew whether a pencil of this kind had or had not been supplied by the deputy returning officer. *In re Halton Provincial Election*, 345.

the divisions of both candidates. There was nothing to shew that, as was alleged, one of the crosses had been placed on each ballot, after the count by the deputy returning officer.

A ballot having a distinct cross in the division of one candidate, and an obliterated cross in that of the other, was allowed for the first.

But where there was a distinct cross in one division, and a very faint one in the other, the ballot was rejected.

A ballot marked for one candidate and having the name of that candidate written on the back, was rejected.

Ballots having, instead of a cross, a perpendicular line, a horizontal line, a straight slanting line, were rejected.

A ballot properly marked, but having on the back words written by the deputy returning officer, was allowed.

Ballots marked by placing the cross on the back were rejected.

Several tremulous connected marks in one division. Ballot allowed.

A strongly marked cross in one division, and a thin faint upright pencil mark on the upper edge of the ballot in the other division, not indicative of any intention to make a cross. Ballot allowed.

A distinct cross, and in the same division, in one case a slight, irregular pencil marking, and in another case a series of slight, cloudy, formless pencil markings. Ballots allowed.

A mark consisting of two lines lying very close to each other, partly coincident and then divergent, both distinctly visible in one division. Ballot allowed, as there was evidence of an intention to make a cross.

Remarks of Ritchie, C.J., in the *Bothwell Case* (1884), 8 S.C.R. 676, 696, referred to.

The notice of appeal from the decision of a county court Judge upon a recount of votes under sec. 129 (1) of the Election Act, need not be signed by the appellant candidate personally, but may be signed by his solicitor or agent on his behalf.

Where both candidates appeal from the decision of the county court Judge, and the result of the appeal of one, first heard and determined, is to give his opponent a majority, the appeal of the other will be heard and determined, although it cannot change the result except by increasing the majority.

Neither appeal having been limited to particular ballots, it was open to the candidate whose appeal was first determined to object, when his opponent's appeal was being heard, to certain ballots not previously objected to. *Re North Grey Provincial Election*, 286.

6. *Petition—Copy—Service.*] — In the printed copy of the petition served upon the respondent the concluding prayer had, by mistake of a clerk, a pen stroke drawn through it:—

Held, that though the copy was not a "true copy" of the

PARTIES.

See PARTITION.

PARTITION.

company, who pulled down some old buildings, put up pavilions, made roads and paths, turned it into a pleasure ground, ran a branch of their electric railway into it, and brought crowds of people there.

During the term he came of age, and at once repudiated the lease, and effected a partition with his co-tenants of the land, to which the company were not parties.

In an action by the plaintiff against the railway company only for possession of his part of the land under the partition, and that the partition might be declared binding, or for a new partition between him and the company, and for a declaration that the lease was not binding on him, and that he had been excluded from possession, and for mesne profits and damages:—

Held, that the partition made could not be declared binding on the company, who were not parties to it, and that the brother and sister were not necessary parties to any new partition between the plaintiff and the company.

Held, also, on the evidence, that the company's conduct in the use of the park was practically an exclusion of the plaintiff from any use he might make of it, and that he was entitled to recover mesne profits from the time he became of age and damages, and a partition was ordered between him and the company for the residue of the term.

Judgment of Meredith, C.J., reversed. *Monro* v. *Toronto Railway Co.*, 36.

PATENT.

See EVIDENCE, 5.

PAYMENT.

Recovery Back—Illegal License Fee.]—A municipal corporation passed a by-law providing that (subject to certain exceptions) no butcher should, without being duly licensed, sell any fresh meat in any part of the municipality. The fee was fixed at $10, and the by-law provided that a penalty of not exceeding $50 might be imposed by summary prosecution. The plaintiff, after some demur, took out licenses for two years, but in the third year refused to do so, and upon appeal by him from his summary conviction for a breach of the by-law, the by-law was held to be invalid, and the conviction was quashed:

Held, in an action brought by him to recover back the fees paid by him, and by other butchers whose rights had been assigned to him, that the fees having been paid with full knowledge of the facts, under a claim of right, without fraud or imposition, and without actual interference with the business of the butchers, or compulsion exercised upon them, could not be recovered back.

RAILWAY COMMITTEE.

RATEPAYER.

RATIFICATION.

SCHOOLS.

thing towards building the house. By his will, dated the 7th February, 1901, he devised the farm to his son, but made no reference to the lease:—

Held, that (the father having died after breach of the undertaking) the son was not entitled to have the house built at the expense of the father's personal estate, but at most was entitled to damages for non-performance of the agreement to build.

Cooper v. *Jarman* (1866), L.R. 3 Eq. 98, and *In re Day*, [1898] 2 Ch. 510, distinguished. *Re Murray*, 418.

STATUTE.

STATUTE OF FRAUDS.

STATUTES.

SUBSCRIPTION.

SURPLUSAGE.

TAXATION.

TAXES.

TENDER.

THIRD PARTY.

TICKET.

TIMBER.

Trespass — Cutting and Removing Timber — Measure of Damages — Wrongful and Wilful Acts.] — In trespass, the inquiry is, what damages will compensate or restore the plaintiff financially to his original position as nearly as possible at the time when the trespass was committed.

Where the defendants had wrongfully and wilfully entered upon and cut and carried away timber from the plaintiffs' limits, and the plaintiffs sued for trespass only:—

Held, that the damages should be measured by: (1) the value of the timber after it was severed and manufactured, so far as it was manufactured, while on the timber limits of the plaintiffs, immediately before the defendants removed it; (2) such sum as represented the extent to which the limits were injured, if at all, by reason of their having been partly denuded by the acts of the defendants; (3) such further and other damage as resulted to the limits by the acts of the defendants, such, for instance, as wasteful methods in cutting, using the surface to pass and repass, etc.

Martin v. *Porter* (1839), 5 M. & W. 351, and *Bulli Coal Co.* v. *Osborne*, [1899] A.C. 351, applied and followed.

Judgment of Lount J., 3 O.L.R. 269, affirmed. *Union Bank of Canada* v. *Rideau Lumber Co.*, 721.

TOLLS.

See WATER AND WALER-COURSES.

TRADEMARK.

1. *"Cream Yeast"—Protection—Acquisition of Right by User—Abandonment—Injunction.*]--The words "cream yeast" are not the proper subject of a trade mark, being common words of description.

Partlo v. *Todd* (1887), 14 A.R. 444, and *Provident Chemical Works* v. *Canada Chemical Co.* (1901), 2 O.L.R. 182, followed.

But the plaintiff's yeast having acquired a reputation in the market under the name of "cream yeast," that name was his property as against persons seeking to use it for the purpose of selling other goods of the same character, and he was entitled to have the defendants restrained from so using it.

The fact that the plaintiff had not for some years before action sold many boxes of the article did not shew an abandonment of the right to use the name in connection with the goods, the plaintiff having always been ready to furnish the article when it was asked for. *Gillett* v. *Lumsden Brothers*, 300.

2. *Fancy Name—Descriptive Letters — Forum — Exchequer Court.*] — The letters C.A.P., standing for the words "cream acid phosphates," a fancy name for acid phosphates manufactured by the plaintiffs, were held to constitute a valid trademark, and an injunction was granted against the use thereof by the defendants, who had used these letters in the sale of goods of the same class, but ostensibly as standing for the words "calcium acid phosphates."

Judgment of Meredith, C.J., 2 O.L.R. 182, reversed.

The amendments to the Exchequer Court Act since the decision in *Partlo* v. *Todd* (1886), 12 O.R. 175, (1887), 14 A.R. 444, (1888), 17 S.C.R. 196, have not had the effect of giving that Court exclusive jurisdiction to adjudicate as to the validity of a registered trademark, and in answer to an action in the High Court of Justice for Ontario to restrain the infringement of a registered trademark, its invalidity may be shewn. *Provident Chemical Works* v. *Canada Chemical Manufacturing Company*, 545.

TRANSIENT TRADER.

See MUNICIPAL CORPORATIONS, 1.

TRESPASS.

See TIMBER.

TRIAL.

See CRIMINAL LAW, 1—DEFAMATION, 1—MEDICINE AND SURGERY.

WAREHOUSEMAN.

See BAILMENT.

WATER AND WATERCOURSES.

Injury to Land by Flooding —Claim for Damages—Summary Procedure—Costs of Action—Erection and Maintenance of Dam — Liability of Owners — Tolls — Liability of Lumbermen Using Dam.]—In an action by the owner of land upon a river against the original defendants for flooding such land by a dam, it appeared that the dam was the property of an improvement company, incorporated under the Timber Slide Companies Act, R.S.O. 1897, ch. 194, and that the original defendants had used it for the purpose only of floating logs down the river; and the improvement company were added as defendants:—

Held, that, although (as decided in *Blair* v. *Chew* (1901), 21 C.L.T. Occ. N. 404) a plaintiff is not bound to proceed summarily upon a claim such as this, under R.S.O. 1897, ch. 85, but has a right to bring an action in the ordinary way, yet, in the absence of any good reason for not proceeding under the special Act, a plaintiff who brings an action should not be allowed the costs of doing so.

2. There is nothing in the Act under which the added defendants were incorporated which confers upon them any right to flood private property, unless they have first taken the steps authorized by the Act for expropriating the property or settling the compensation to be paid for flooding it, which these defendants had not done.

3. Nor were the defendants assisted by secs. 15 and 16 of R.S.O. 1897, ch. 140, for, even if the dam was erected before the plaintiff's purchase of his property from the Crown, there was nothing to shew that the price he paid was reduced in consequence.

4. But sec. 1 of R.S.O. 1897, ch. 142, places the public advantage of allowing lumbermen to use rivers and streams as highways for carrying their logs to a market, above the private damage and inconvenience which may necessarily be caused to individual riparian proprietors by their doing so; and the original defendants were not liable for any damage sustained by the plaintiff by reason of their having, during any spring, autumn, or summer freshet, caused damage to the plaintiff by using or repairing or maintaining any dam necessary to facilitate the transmission of their timber down the stream.

5. The rights given to persons desiring to float their own timber down a stream should not, however, be extended to companies incorporated for the purpose of making a profit by improving streams and charging tolls to lumbermen desiring to use them; and this view is strengthened by sec. 15 of R.S.O. 1897, ch. 194. *Neely* v. *Peter*, 293.

WILL.

children died before attaining twenty-one, the legacies were to fall into the estate. Both the grandchildren attained twenty-one before the death of the widow:—

Held, that interest on the legacies should be paid by the estate only from the death of the widow.

Toomey v. *Tracey* (1883), 4 O.R. 708, distinguished.

Decision of MacMahon, J., reversed. *Re Scadding*, 632.

7. *Construction—Alternative Disposition—Death of Testator and Wife "at the Same Time."*]—The testator bequeathed to his wife all his estate and appointed her his executrix. His will then proceeded: "In case both my wife and myself should by accident or otherwise be deprived of life at the same time I request the following disposition to be made of my property"—disposing of his estate and appointing executors. A few months after the making of the will the testator and his wife went to Europe, and both of them died there, the wife on the 11th December, 1888, and the testator on the 27th of the same month:—

Held, that the testator and his wife were not deprived of life at the same tlme, the deaths not being the result of a common accident or other catastrophe, and as the actual event was not provided for there was an intestacy.

Held, also, that there was no power in the Court to interpolate any such words as "or in case I shall survive her."

Judgment of a Divisional Court, 2 O.L.R. 169, affirmed, MACLENNAN and GARROW, JJ.A., dissenting. *Henning* v. *MacLean*, 660.

8. *Construction—Annuities—Creation of Fund for—Right to Resort to Corpus.*]—The testator by his will made certain specific bequests and devises, and then gave to his executors all the residue of his property, real and personal, in trust to provide means to pay the expenses of administration, to pay debts, and to pay the bequests thereinafter made, with power to the executors to sell lands, etc., "to deposit at interest, lend on security of mortgages, or invest in the Dominion funds, any balance that may be on hand at any time, to form a fund to keep up the yearly payments to my sisters. . . . namely, to pay to each one of my sisters . . $250 a year, or, if there be not so much available in any year, then to divide equally between them what may be available and make up the deficiency to them when there are funds to do it with, and to pay to any of them who may have greater need on account of ill health or misfortune a greater sum than the others and a greater sum than $250." The will then directed the executors, after sufficient funds had been invested to keep up the payments to the sisters, to pay certain specific sums to

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WINDING-UP ACT.

WORDS.

WORKMAN'S COMPENSATION ACT.

WRIT OF SUMMONS.